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TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, ~~1929~~ 1930

No. ~~800~~ 74

THE UNITED STATES OF AMERICA, PETITIONER

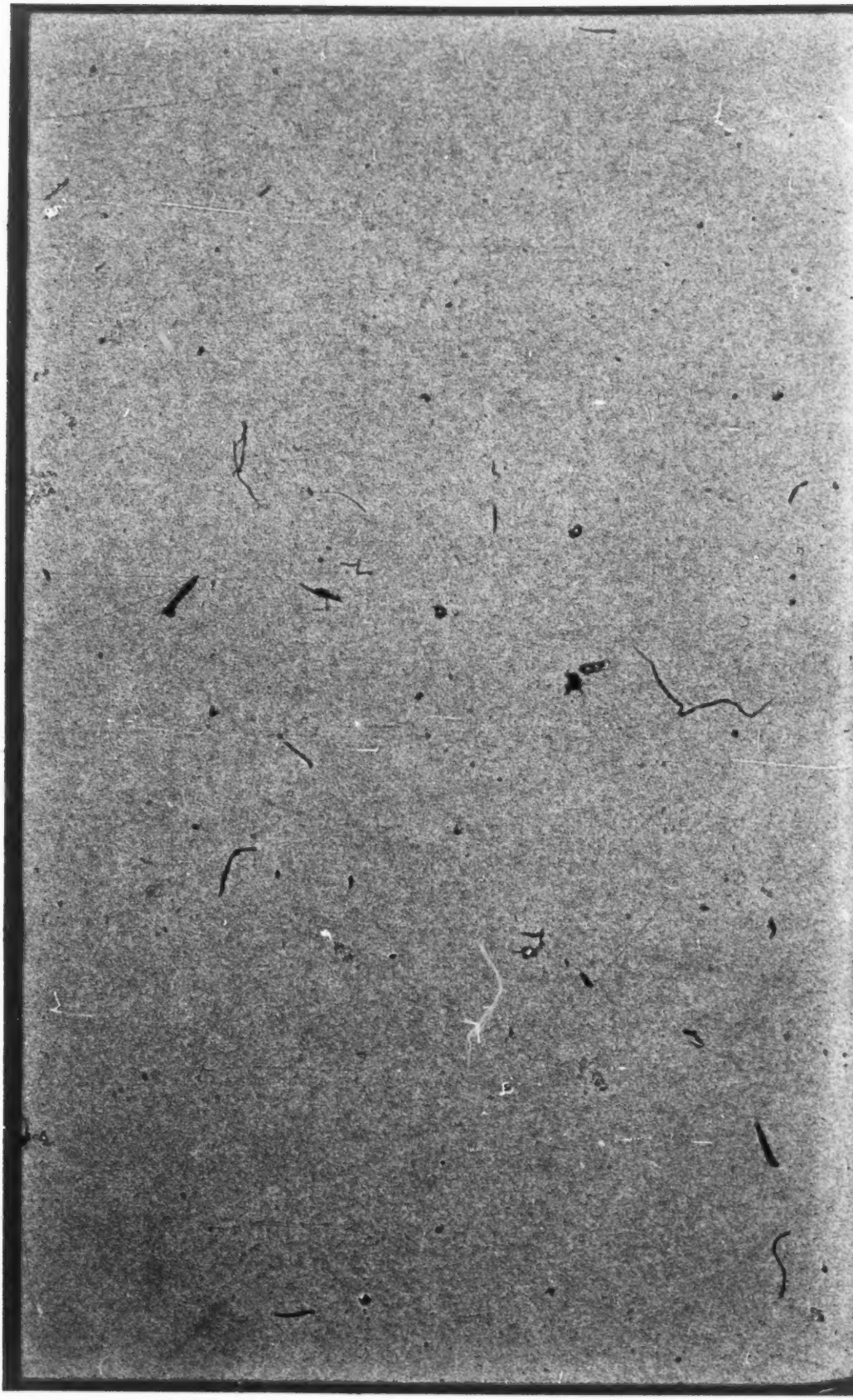
vs.

ANTHONY LA FRANCA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR CERTIORARI FILED APRIL 7, 1930
CERTIORARI GRANTED MAY 5, 1930

(34931)



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INDEX

	Original	Print
Proceedings in U. S. C. C. A., Fifth Circuit	A	
Caption (omitted in printing)	A	
Record from D. C. U. S., Eastern Louisiana	1	1
Caption (omitted in printing)	1	1
Petition	1	1
Special demurrer	9	5
Plea of former jeopardy	10	5
Hearing on special demurrer and plea of former jeopardy and submission	12	6
Order dismissing special demurrer and denying plea of former jeopardy	13	7
Opinion, Burns, J., on special demurrer and plea of former jeopardy	14	7
General demurrer	19	10
Defendant's plea of res adjudicata	20	10
Hearing on plea of res adjudicata and general demurrer and submission	21	11
Order overruling general demurrer and plea of res adjudicata	22	11
Answer	22	12
Supplemental and amended answer	26	13
Stipulation of counsel waiving trial by jury	27	14
Stipulation of facts	28	14
Exhibit—Act No. 39 of the legislature of the State of Louisiana	31	16
Joint motion for findings of fact and order granting same	38	20
Motion of plaintiff for conclusions of law and judgment	38	20

Record from D. C. U. S., Eastern Louisiana—Continued.	Original	Print
Case called, argued, and submitted	41	21
Opinion, Dawkins, J	42	22
Motion for new trial	43	22
Hearing on motion for new trial and order overruling same	44	23
Judgment	45	23
Petition for appeal, order allowing same, and fixing supersedeas bond	46	23
Assignment of errors	47	24
Certificate of Judge Dawkins to file exceptions	48	25
Bill of exceptions and order approving same	49	26
Supersedeas bond on appeal (omitted in printing)	50	26
Præcipe for transcript of record	52	26
Clerk's certificate (omitted in printing)	55	27
Citation	55	27
Argument and submission (omitted in printing)	56	27
Opinion, Walker, J	57	28
Judgment	60	30
Clerk's certificate (omitted in printing)	61	30
Order allowing certiorari	62	30

A [Caption omitted.]

1 In United States District Court, Eastern District of Louisiana, New Orleans Division

Petition

Filed Nov. 9, 1927

Now comes the United States of America, by Wayne G.
2 Borah, United States attorney, and T. M. Logan Bruns, assistant United States attorney for the Eastern District of Louisiana, and bring this action on behalf of the United States against Anthony LaFranca, a citizen of the State of Louisiana, domiciled in the city of New Orleans, in said State and within the jurisdiction of this court; this action being brought at the request of the Commissioner of Prohibition, through the prohibition administrator for the tenth prohibition administrative district and upon information furnished by said prohibition administrator; and with respect represents:

I

That on the dates hereinafter mentioned, the defendant was the owner, operator, and proprietor of the restaurant commonly known as the "Delmonico Restaurant," located at the municipal number 1300 St. Charles Avenue, in the city of New Orleans, State of Louisiana.

II

That at or about 9.00 p. m., October 10, 1924, in said restaurant, the defendant did possess and sell to one William Trahan, a white man, at the rate of fifty cents ($.50) per drink, nine (9) drinks of whiskey for the sum of four dollars and fifty cents ($4.50).

III

That at or about 10.20 p. m., October 23, 1924, in said restaurant, defendant did possess and sell to the said William Trahan, at the rate of fifty cents ($.50) per drink, five (5) drinks of whiskey for the sum of two dollars and fifty cents ($2.50); and on the
3 same date, time, and place, defendant did possess and sell to one Eugene Hogan, a white man, at the rate of fifty cents ($.50) per drink, two drinks of whiskey for the sum of one dollars ($1.00).

IV

That at or about 5.00 p. m., October 24, 1924, in said restaurant, the defendant did possess and sell to the said E. M. Hogan, at the rate of fifty cents ($.50) per drink, two drinks of apricot brandy for the

sum of one dollar ($1.00); and on the same date, time and place, defendant did possess and sell to the said William Trahan, for one dollars and fifty cents ($1.50) one-half pint of apricot brandy.

V

That at or about 8.00 p. m., April 23, 1925, in said restaurant, the defendant did possess and sell to the said William Trahan, at the rate of seventy-five cents ($.75) per drinks four (4) drinks of benedictine for the sum of three dollars ($3.00).

VI

That at or about 7.00 p. m., April 25, 1925, in said restaurant, the defendant did possess and sell to the said William Trahan, at the rate of fifty cents ($.50) per drinks three (3) drinks of whiskey for the sum of one dollars and fifty cents ($1.50), and one bottle containing five (5) ounces of whiskey for one dollars and fifty cents ($1.50).

4

VII

That all the drinks of liquors, to wit: Whiskey, benedictine, and apricot brandy, possessed and sold by defendant, as aforesaid, were distilled spirits, intoxicating liquors fit for beverage purposes and containing more than one-half of one per cent of alcohol by volume.

VIII

That by reason of his selling, as aforesaid, distilled spirits in less quantity than five wine gallons at the same time, to wit: Nine (9) drinks of whiskey on October 10, 1924; five (5) drinks of whiskey on October 23, 1924; two (2) drinks of apricot brandy on October 24, 1924; four (4) drinks of benedictine on April 23, 1925, and three (3) drinks of whiskey and five (5) ounces of whiskey on April 25, 1925, the defendant became, and was, on the aforesaid dates a retail liquor dealer, subject to the payment of a tax as such, to plaintiff, as provided by section 3244, of the United States Revised Statutes as amended and doubled under section 35 of Title II of the act approved October 28, 1919, known as the national prohibition act, in the sum of thirty-seven dollars and fifty cents ($37.50) being the special tax of a retail liquor dealer for nine (9) months, ending June 30, 1925.

IX

That the aforesaid retail liquors dealer's tax was due and payable to plaintiff by this defendant on October 10, 1924, and defendant was required, as provided by section 53 of act of October 1, 1890, 26 Stat. L. 624, to make and file a return on that date, but defend-

5 ant failed so to do and has so failed up to this date and thereby has incurred an additional tax penalty, which is due

and payable to plaintiff as provided by section 3176 of the United States Revised Statutes, as amended, in the sum of four dollars and sixty-eight cents ($4.68).

X

That act No. 39 of the Legislature of the State of Louisana, approved November 16, 1921, prohibits the business of a retail liquor dealer in the State of Louisiana, and so prohibited such business during the years 1924 and 1925.

XI

That by reason of the aforesaid sales this defendant did carry on, on the aforesaid dates, the business of a retail liquor dealer, as defined in section 3244 of the United States Revised Statutes as amended, contrary to the law of the State of Louisana, and incurred thereby a special tax in the sum of fifteen hundred ($1,500.00) dollars which is due and payable to plaintiff as provided by section 701 of the revenue act of 1924, in lieu of section 1001 of the revenue act of 1921, which was in turn in lieu of section 1001 of the revenue act of 1918, and doubled under section 35 of Title II of the act approved October 28, 1919, known as the national prohibition act.

XII

That by reason of the aforesaid sales of intoxicating liquor
6 on the dates heretofore set out, defendant became, and was, a retail liquor dealer and as set forth in section 35 of Title II of the act approved October 28, 1919, known as the national prohibition act, became liable to plaintiff in the penal sum of five hundred ($500.00) dollars, as provided by said section 35.

XIII

Plaintiff further shows that in the proceeding entitled The United States vs. Anthony LaFranca, No. 18034, of the docket of this court the said Anthony LaFrance in his amended and supplemental answer filed therein in his behalf by his solicitor, John E. Jackson, did admit that on October 23, 1924, he sold to one William Trahan, intoxicating liquor, to wit, two (2) drinks of whiskey.

XIV

Plaintiff further shows that in the proceeding entitled The United States vs. Anthony LaFranca, No. 10124 of the docket of this court, the said Anthony LaFranca on April 28, 1926, did plea guilty to the charge of selling intoxicating liquor on the dates and in the form and manner set forth in articles two, three, four, and six of this petition, to wit: On October 10, 1924, nine (9) drinks of whiskey, on October 23, 1924, whiskey, on October 24, 1924, brandy, on April 25, 1925, whiskey; all of said intoxicating liquor being sold by the

said Anthony LaFranca at 1300 St. Charles Avenue, this city, and containing more than one-half of one per cent of alcohol by volume.

XV

That on April 22, 1927, O. D. Jackson, prohibition administrator for the tenth prohibition administrative district, acting for
7 the Prohibition Commissioner, posted by registered mail to this defendant the following notice:

MR. ANTHONY LAFRANCA,
1300 St. Charles Ave., New Orleans.

SIR: You are hereby notified it has been made to appear that you have unlawfully sold intoxicating liquors in violation of the national prohibition act, to wit: On October 23rd, 10th, 24th, 1924; April 23rd and 25th, 1925; and as a result thereof have incurred liability to the United States of America in the following sums:

Special tax as retail liquor dealer, 9 months ending 6/30/24, sec. 3244, R. S., doubled by sec. 35, Title II, N. P. A	$37.50
25% penalty for failure to make return as required by law, sec. 3176 R. S., as amended	4.68
Special tax as retail liquor dealer, 9 months ending 6/30/24, in violation of State law of Louisiana, sec. 701, rev. act 1926, doubled by sec. 35, Title II, N. P. A	1,500.00
Specific penalty for unlawful sales as retail liquor dealer. Sec. 35, Title II, N. P. A	500.00
Total liability	2,042.18

Demand is hereby made upon you for payment or adjustment of the said taxes and penalties, and unless same are adjusted within 15 days from the date of this notice, a schedule of such liability will be certified to the United States attorney for the judicial district wherein the violation was committed, with request that action
8 thereon be forthwith brought for the recovery of said taxes and penalties.

XVI

That on August 11, 1927, having discovered certain errors in the above set forth demand made on Anthony LaFranca by letter of April 22, 1927, to wit: That the dates therein referred to as "9 months ending 6/30/24" should be 9 months ending 6/30/25, and the "sec. 701 rev. act of 1926" therein referred to should be 701 rev. act of 1924, the said O. D. Jackson, acting for the Prohibition Commissioner and on behalf of the United States of America, did make another demand on the said Anthony LaFranca in the form and manner set forth in article fifteen of this petition in which said typographical errors were corrected.

XVII

That registered return receipt cards No. 101919 and No. 76762 of the United States post office shows that both of said demands were

received by defendant, to wit, on April 24, 1927, and August 12, 1927, but that said demands have been without avail.

XVIII

Because of the facts set forth above there is due by defendant to plaintiff the sum of two thousand and forty-two and 18/100 ($2,042.18) dollars, which sum plaintiff is entitled to recover.

Wherefor, plaintiff prays that defendant be served with a
9 copy of this petition and cited to answer that after legal delay and due proceedings had, plaintiff, the United States of America, have and recover of defendant, Anthony LaFranca, the full sum of two thousand and forty-two and 18/100 ($2,042.18) dollars and all costs of this proceedings.

(Signed) WAYNE G. BORAH,
United States Attorney.
(Signed) T. M. LOGAN BRUNS.
Asst. U. S. Attorney.

[*Duly sworn to by T. M. Logan Bruns, jurat omitted in printing.*]

In United States District Court

Special demurrer

Filed Dec. 2, 1927

Now, comes, Anthony LaFranca, made defendant in the
10 above numbered and entitled cause, appearing solely for the purpose of this demurrer, demurs to the petition herein on the following ground, to wit:

That the United States attorney appearing for the United States, has no right or authority to appear herein at the request of the Commissioner of Prohibition for the tax penalties sought herein to be recovered, and in violation of section 3214 and section 3164 of the Revised Statutes of the United States, and also of paragraph C of section 4 of the act of Congress, March 3, 1927.

Wherefore, defendant prays to be hence dismissed with costs.

(Sgd.) M'CALEB & M'CALEB.
(Sgd.) REGINALD H. CARTER, JR.,
Attorneys for defendant.

In United States District Court

Plea of former jeopardy

Filed Dec. 2, 1927

Now comes Anthony LaFranca, made defendant in the above numbered and entitled cause, appearing solely for this plea and pleads in bar to the suit herein of the plaintiff on the following grounds:

(1) This is an action to recover tax penalties or penalties under the jurisprudence of the courts of the United States, and not taxes in the strict sense of the word.

11 (2) That said action by the United States should be dismissed for the reason that your defendant has already been penalized for the same and identical charges as set forth in plaintiffs petition, to wit: In the criminal information No. 10,124 of the criminal docket of this honorable court, and on April 28, 1926, your defendant pleaded guilty to the charges set forth in said information which are identical and provable by the same evidence as the penalties herein sought to be recovered, and there was a judgment of conviction entered on said date, to wit: April 28, 1926, fining respondent in the sum of $300.00, and imposing a six months suspended sentence upon him for his aforesaid violation of the national prohibition act.

(3) Defendant further avers that the United States in the petition herein filed has admitted in section 15, thereof, that you [your] defendant pleaded guilty in said criminal information as above set forth, and was penalized by the judgment of conviction therein.

Wherefore, defendant prays that this plea of former jeopardy be heard before other matters in this cause, and that it be decreed by this honorable court that the so-called taxes sought to be recovered by the United States are penalties, and defendant further prays that accordingly this plea of former jeopardy be sustained, inasmuch as said penalties sought to be recovered are provable by the same evidence and upon the same facts for which there is a judgment of conviction in favor of the United States, in the proceedings No. 10,124 of the criminal docket of this honorable court, and that he be accordingly dismissed with costs.

(Signed) M'Caleb & M'Caleb.
(Signed) Reginald H. Carter, Jr.,
Attorneys for Defendant.

12 *[Duly sworn to by Anthony LaFranca, jurat omitted in printing.]*

In United States District Court

Hearing on special demurrer and plea of former jeopardy and submission

May 16, 1928

This cause came on this day to be heard on the special demurrer & plea of former jeopardy, filed on behalf of defendant.

13 Present: E. Howard McCaleb, jr., of McCaleb & McCaleb and Reginald H. Carter, jr., Esqs., attorneys for defendant.

Present: T. M. Logan Bruns, assistant United States attorney, appearing on behalf of the United States.

Whereupon, after hearing arguments of counsel for the respective parties, the cause was submitted when the court took time to consider.

In United States District Court

Order dismissing special demurrer and denying plea of former jeopardy

May 25, 1928

This cause came on at a former day to be heard on the special demurrer and the plea of former jeopardy filed on behalf of the defendant, and was argued by counsel for the parties in interest and submitted when the court took time to consider.

14 Whereupon, and on due consideration whereof, and for the reason of the court assigned in writing and on file herein,

It is ordered by the court that the special demurrer understood to be abandoned be dismissed, and that the plea of former jeopardy be and the same is hereby denied.

In United States District Court

Opinion

Filed May 25, 1928

On special demurrer & plea of former jeopardy

BURNS, District Judge:

This is a civil suit at law, commenced by a petition alleging in substance that the defendant on specified date in October of 1924, and in April of 1925, was the owner, operator, and proprietor of the Delmonico Restaurant at 1300 St. Charles Street in New Orleans, where he had possessed and sold to Federal prohibition agents certain drinks of whiskey and other liquor, viz., a total of some sixteen drinks on three occasions in October, 1924, and a total of eight

15 drinks on two occasions in April, 1925; that, by his answer in a civil proceedings (in which it appears that the premises were declared a nuisance and closed by a writ of injunction under section 22 of the national prohibition act), the defendant admitted two of the said sales charged against him in October; and that in a criminal prosecution he pleaded guilty to the other of said sales (for which it appears he was sentenced to pay a fine of $300.00 and serve a term of imprisonment, execution of this latter being suspended under the national probation act of March 4, 1925).

The petition further recites that because of these said same acts, viz, by reason of the defendant selling distilled spirits in quantities

of less than five gallons at the same time, he became and was on these five dates a retail liquor dealer subject to the payment of a tax as such to the plaintiff Government under the provisions of U. S. Revised Statutes 3244, the tax provided by which statute to be doubled according to section 35, Title II, of the national prohibition act; that because he failed to make and file a return as a retail liquor dealer to the collector of internal revenue as required by section 53 of the act of October 1, 1890 (26 Stat. L. 624), he is liable for an additional tax penalty under U. S. Rev. Stat. 3176; that since the State of Louisiana by Act 39 of 1921 (Hood Act), prohibits the business of retail liquor dealer, he thereby incurred a special "tax" in the sum of $1,500.00, which is due and payable to the plaintiff United States under section 701 of the revenue act of 1924, in lieu of section 1001 of the revenue act of 1921, which in turn was in lieu of section 1001 of the revenue act of 1918, and this "tax" is doubled under section 35 of Title II of the national prohibition act
16 (October 28, 1919); that also because of his quality as a retail liquor dealer he is liable further in the penal sum of $500.00, as a specific penalty under said section 35.

The defendant demurs to the authority of the United States attorney to file such proceedings, but upon argument abandons that defense. He insists, however, on his plea former jeopardy, viz, that his prior conviction of the same charges and his sentence to a fine and imprisonment under section 29 of the national prohibition act bar this proceeding, which would otherwise put him twice in jeopardy for the same offense in violation of his constitutional immunity under the 5th amendment, and also the prohibition of dual prosecution in section 5 of the Willis Campbell Act (November 27, 1921).

Much argument orally and by briefs was indulged upon the hearing and submission of this plea with copious citations of authority on both sides. Reference to these will appear where it seems necessary as this opinion proceeds.

Section 35 of the national prohibition act was undoubtedly designed to cumulate penalties in addition to those variously provided in other sections of the act, in keeping with the general design of the whole act to enforce the eighteenth amendment by effectually suppressing the manufacture, traffic in, and use of alcoholic beverages. Congress emphasized this purpose by the supplemental act of November 23, 1921 (Willis-Campbell Act), after the Supreme Court's decisions in the case of United States vs. Yuganovich et al., 256 U. S. 450, holding that the penalties in section 35 superceded those in the Revised Statutes verbis Internal Revenue.

Section 5 of the Willis Campbell Act then operated to continue in force all non-conflicting revenue statutes (U. S. vs. Stafoff,
17 260 U. S. 477). It provides, inter alia, "but if any act is a violation of any such laws, and also of the national prohibition act, or this act, a conviction for such an act or offense under one shall be a bar to prosecution therefore under the other."

In Lipke vs. Lederer, 259 U. S. 557, the Supreme Court affirmatively held that the so-called taxes imposed by section 35 were in fact penalties imposed for violations of criminal laws which could not be collected by administrative officers in distraint proceedings, designed for the collection of taxes. Regal Drug Co. vs. Wardell, 260 U. S. 386, and U. S. vs. One Ford Coupe, 272 U. S. 321, P. 329, are to the same effect.

Suits for penalties and forfeitures are not novel in the Federal system. Such suits, while civil in form, have been uniformly recognized as of a quasi criminal character, they proceed on the law side of the court with trial by jury, whilst those for forfeitures are generally in rem, which proceed in much the same form as admiralty suit, except where seizures are made upon land, and these proceed at law by trial to a jury. Notwithstanding suits for penalties contemplate punishment for offenses, and are triable at law to a jury, they are not criminal prosecutions. The constitutional right to trial by jury in criminal cases, where the punishment is a fine or imprisonment, arises not from the fifth amendment, but from the sixth; whereas in civil cases, where the punishment is a penalty, the right to a jury trial arises from the seventh amendment. The difference does not consist merely in the civil form of the law suit by which they are collected, but in the substantial difference that the judgment is enforceable by ordinary execution and levy, as by writs of fiere facias, and not by commitment or imprisonment as in the
18 case of a fine. It is precisely this difference that would prevent the collection of such penalties by criminal information or indictment, and also prevent judicial relief from execution of judgment under the national probation act of March 4th, 1925. However, it follows that the defendants life or limb is not twice put in jeopardy for the same offense by the prosecution of this civil suit for a penalty. So far as the guaranties of the fifth amendment are concerned, such a suit, which may deprive him of property only, assures him due process of law.

The same considerations dispose of defendant's second contention with respect to the elective clause of section 5 of the Willis-Campbell Act. His conviction under various sections of the national prohibition act, for which he was fined and imprisoned under section 29, for the criminal offenses charged by indictment or information, will bar any other criminal prosecution for the same offense, but will not bar a civil prosecution for the cumulative penalty even though it be predicated on the same offense. In re Leszyasky, Fed. Cas. 8279; U. S. vs. Calflin, 97 U. S. 546; U. S. vs. Wiltberger, 5 Wheat. 75, 95; Origet vs. U. S. 125 U. S. 240, 247; U. S. vs. Three Copper Stills, 47 Fed. 499; U. S. vs. Zucker, 161 U. S. 475.

No other issues are raised by the plea, for the purpose of which the charges and allegations appearing on the face of plaintiff's petition are taken as true.

Accordingly, the plea of former jeopardy will be overruled and denied. The special demurrer, understood to be abandoned will be dismissed.

(Signed) LOUIS H. BURNS,
United States District Judge.

MAY 25TH, 1928.

19 In United States District Court

General demurrer

Filed June 6, 1929

Reserving the benefit of the plea of former jeopardy heretofore filed, and in nowise waiving the same, appearing solely for the purpose of this demurrer, the defendant, Anthony LaFranca comes thru his attorneys and demurs to the petition in the above-styled cause, for the reason:

1. That said petition does not state a cause of action against this defendant upon which this plaintiff can recover.

2. That said petition is based upon a statute which is unconstitutional, to wit: National prohibition act, particularly section 35 thereof, and section 5 of the act of November 3, 1921, in that said foregoing statutes are in violation of the Constitution of the United States, and particularly amendment 8 thereof.

3. That the petition herein set forth no cause of action because the particular cause of action sued on herein has been barred by the conviction of this defendant in case No. 10,124, of the criminal docket of this court for violation of the said national prohibition act, and therefore the action herein sued on can not be maintained by virtue of the provisions of the act of Congress, November 3, 1921, known as the Willis Campbell Act, particularly section 5 thereof.

20 Wherefore, defendant prays that this demurrer be maintained and plaintiff's suit be hence dismissed with costs.

(Sgd.) M'CALEB & M'CALEB,
Attorneys for Defendant, R. H. Carter, jr.

Plea of res adjudicata

Filed June 6, 1928

Now comes Anthony LaFranca, the defendant herein and reserving the benefit of the plea of former jeopardy heretofore filed and in nowise waiving the same, appearing solely for the purpose of this plea, says:

That on or about April 28, 1926, in the criminal information No. 10,124, of the criminal docket of this court, the defendant herein

plead guilty to the provisions set forth in said information and there was judgment entered on said date, to wit: April 28, 1926, fining defendant in the sum of three hundred ($300.00) dollars, and imposing a six months suspended sentence upon him.

That said judgment is a final judgment in favor of the United States and that the matters and things now set up and sought to be recovered on are identical with those for which your defendant has already been punished in the proceedings No. 10.124 as aforesaid.

Wherefore, defendant prays that this plea of res adjudicata be maintained and that he be dismissed with costs.

(Signed) M'CALEB & M'CALEB,
R. H. CARTER, JR.,
Attorneys for Defendant.

21 In United States District Court

Hearing on plea of res adjudica and general demurrer and submission

July 11, 1928

Hearing before honorable Ben C. Dawkins, District Judge

This cause came on this day to be heard upon the general demurrer and plea of res adjudica, filed on behalf of defendant.

Present: E. Howard M'Caleb, jr., attorney for defendant and plaintiff in rule.

Present: T. M. Logan Bruns, assistant U. S. atty., appearing on behalf of the United States.

and were argued by counsel for the respective parties and submitted when the court took time to consider.

22 In United States District Court

Order denying general demurrer and plea of res adjudicata

August 29, 1928

This cause came on at a former day to be heard on the general demurrer and plea of res adjudica and was argued by counsel and submitted;

Whereupon, and on consideration thereof;

It is ordered that the general demurrer and plea of res adjudica filed herein be and the same is hereby overruled, counsel for defendant taking a bill of exception to the ruling of the court.

In United States District Court

Answer

Filed Sept. 10, 1928

Now comes Anthony LaFranca, made defendant in the
23 above numbered and entitled cause, and reserving the benefit of the pleas and exceptions heretofore filed and overruled by the court, for answer to the action herein filed says:

1. The allegations of paragraph one are admitted.

2. For lack of information respondent denies the allegations of paragraph two.

3. For lack of information respondent denies the allegations of paragraph three.

4. For lack of information respondent denies the allegations of paragraph four.

5. For lack of information respondent denies the allegations of paragraph five.

6. For lack of information respondent denies the allegations of paragraph six.

7. Respondent denies the allegations of paragraph seven.

8. Paragraph eight contains only conclusions of law and not allegations of fact and respondent denies all the allegations of said article.

9. Respondent denies the allegations of paragraph nine.

10. For lack of information respondent denies the allegations of paragraph ten.

24 11. Respondent denies the allegations of paragraph eleven.

12. Respondent denies the allegations of paragraph twelve.

13. In answer to paragraph thirteen respondents says that the matters and allegations contained therein should be stricken from this record, and for lack of information denies the allegations thereof.

14. In answer to paragraph fourteen respondent says that the matters and things set forth therein are irrelevant and immaterial and should be stricken from this record, and if allowed to stay in the record, this respondent reiterates and reavers the pleas of former jeopardy and res adjudicata heretofore filed and overruled by the court. That the plaintiff herein is attempting to prove this case upon the evidence in a like criminal proceeding. Respondent further says that he admits that in the case No. 10,124 of the docket of this court he plead guilty to various charges of selling intoxicating liquor, but is not informed as to the dates thereof, or to whom said liquor was sold.

15. Respondent admits he received a letter addressed from O. D. Jackson, prohibition administrator, as set forth in paragraph fifteen and avers that said paragraph in plaintiffs petition should be stricken from the record, that the same is irrelevant and immaterial.

16. For lack of information respondent denies the allegations of paragraph sixteen.

25 17. Respondent admits amicable demand without avail, but denies the balance of said paragraph seventeen.

18. Respondent denies the allegations of paragraph eighteen.

Wherefore, respondent prays that the demand of the plaintiff be rejected, and he be hence dismissed with costs.

(Signed) M'CALEB & M'CALEB.
(Signed) REGINALD H. CARTER, JR.
Attorneys for Anthony LaFranca, Respondent.

[*Duly sworn to by Anthony LaFranca, jurat omitted in printing.*]

26 In United States District Court

Supplemental answer of defendant and order

Filed Jan. 18, 1929

Now comes Anthony LaFranca, defendant herein, with leave of court first had and obtained, for supplemental and amended answer to the petition herein filed says:

1. Defendant reiterates and reavers all of the allegations of the original answer filed herein, and for further answers says:

2. That by paragraphs ten, eleven, and twelve of the petition the plaintiff is seeking to recover penalities imposed under section 701 of the revenue act of 1924, as amended and doubled under section 35 of Title II of the act approved October 28, 1919, known as the national prohibition act in the sum of fifteen hundred ($1,500.00) dollars.

3. Now defendant says that the aforesaid amount sought to be recovered by the plaintiff should be disallowed and striken from the record herein for the reason that section 701 of the revenue act of 1924, and particularly paragraph nine thereof is unconstitutional, in that it violates the Constitution of the United States.

4. That said section 701 of the revenue act of 1924, particularly paragraph nine thereof is violative of the fifth amendment of the Constitution of the United States, in that it deprives defend-

27 ant of his property without due process of law in imposing a penalty for violation of a State law.

5. Defendant further avers that section 701 of the revenue act of 1924, particularly paragraph nine thereof, is further violative of the tenth amendment of the Constitution of the United States, in that it impinges upon the power reserved to the States, particularly the State of Louisiana.

Wherefore, defendant prays for leave of court to file this supplemental and amended answer and that he be hence dismissed with costs.

M'CALEB & M'CALEB,
Attorneys for Defendant.

Order

Let the foregoing supplemental and amended answer be filed. New Orleans, La., January 18, 1929.

(Signed) WAYNE G. BORAH,
United States Judge.

In United States District Court

Stipulation of counsel waiving trial by jury

Filed Mar. 19, 1929

It is stipulated and agreed that a trial by jury be waived in
28 the above entitled cause, and that the issues of fact and of law in said action be heard, tried, and determined by the Judge of the above named Court as provided for by Section 649 of United States Revised Statutes.

(Signed) T. M. LOGAN BRUNS,
Of Counsel for Plaintiff.

(Signed) E. HOWARD M'CALEB, JR.,
Of Counsel for Defendant.

In United States District Court

Stipulation of facts

Filed Mar. 19, 1929

It is stipulated and agreed that if the witnesses were sworn and testified in this case and the available documentary proof introduced that they would establish the following facts and the parties hereto agree to same, and evidence of which, except this agreement, need not be made further upon the trial, the facts in this case being stipulated to be:

1. That on the dates hereinafter mentioned the defendant was the owner, operator, and proprietor of the restaurant commonly known as the "Delmonico Restaurant," located at the municipal number 1300 St. Charles Avenue, in the city of New Orleans, State of Louisiana.

2. That at or about 9.00 p. m., October 10, 1924, in said restaurant, the defendant did possess and sell to one William Trahan, a
29 white man, at the rate of fifty cents (.50) per drink nine (9) drinks of whiskey for the sum of four dollars and fifty cents ($4.50).

3. That at or about 10.20 p. m., October 23, 1924, in said restaurant, defendant did possess and sell to the said William Trahan, at the rate of fifty cents ($.50) per drinks, five (5) drinks of whiskey for the sum of two dollars and fifty cents ($2.50); and on the same date,

time, and place, defendant did possess and sell to one Eugene Hogan, a white man, at the rate of fifty cents ($.50) per drink, two drinks of whiskey for the sum of one dollars ($1.00).

4. That at or about 5.00 p. m., October 24, 1924, in said restaurant, the defendant did possess and sell to the said E. M. Hogan, at the rate of fifty cents ($.50) per drinks, two drinks of apricot brandy for the sum of one dollars ($1.00); and, on the same date, time, and place defendant did possess and sell to the said William Trahan for one dollar and fifty cents ($1.50), one-half pint of apricot brandy.

5. That at or about 8.00 p. m., April 23, 1925, in said restaurant, the defendant did possess and sell to the said William Trahan, at the rate of seventy-five cents ($.75) per drinks, four (4) drinks of benedictine for the sum of three dollars ($3.00).

6. That at or about 7.00 p. m., April 25, 1925, in said restaurant, the defendant did possess and sell to the said William Trahan, at the rate of fifty cents ($.50) per drinks, three (3) drinks of whiskey for the sum of one dollars and fifty cents ($1.50), and one bottle containing five ounces of whiskey for one dollar and fifty cents ($1.50).

30 7. That all the drinks of liquors, to wit: Whiskey, benedictine, and apricot brandy, possessed and sold for beverage purposes by defendant, as aforesaid, were distilled spirits, intoxicating liquors fit for beverage purposes, and containing more than one-half of one per cent of alcohol by volume.

8. That defendant never made and filed a return as provided by section 53 of act of October 1, 1890, 26 Stat. L. 624, showing the commencing of the trade or business of a retail liquor dealer (or the later carrying on of such business) on October 10, 1924, or on any subsequent date.

9. That the attached copy of Act No. 39 of the Legislature of the State of Louisiana, approved November 16, 1921, is a true and correct copy of said act and that said act was in full force and effect in the State of Louisiana during the years 1924 and 1925.

10. That in the proceeding entitled the United States vs. Anthony LaFranca, No. 10124, of the docket of this court, the said Anthony LaFranca on April 28, 1926, did plead guilty to the charge of possessing intoxicating liquor on August 23, 1923, maintaining a common nuisance on April 25, 1925, and to selling intoxicating liquor on the dates and in the form and manner set forth in articles two, three, four, and six of this stipulation, to wit: on October 10, 1924, nine (9) drinks of whiskey, on October 23, 1924, whiskey, on October 24, 1924, brandy, on April 23, 1925, benedictine, on April 25, 1925, whiskey, in violation of sections 3, 21, and 29 of the national prohibition act, upon which three charges he was sentenced to pay a fine of $300 and to serve a six-month term of imprisonment,

31 execution of this latter being suspended under act of March 4, 1925.

It is further agreed that demand was made [illegible] and received by the defendant for the taxes and tax penalties sought to be recovered in this suit, in the manner and form set forth in articles XV, XVI, and XVII of plaintiff's petition, but that said demands were without avail, and the said taxes and tax penalties have never been paid.

It is understood and agreed that the defendant fully reserves the right to urge the legal defenses heretofore raised by his pleadings and that the use of the words "taxes" and "tax penalties" in the previous paragraph of this stipulation in no way binds either party from arguing the true nature of any item sought to be recovered in this suit.

(Signed) T. M. LOGAN BRUNS,
Of Counsel for the United States.
(Signed) E. HOWARD M'CALEB, JR.

Exhibit attached to stipulation of facts, being Act No. 39 of the Legislature of the State of Louisiana

Filed Mar. 19, 1929

Act No. 39

Senate Bill No. 11. By Mr. Hood

An Act to prohibit the manufacture, sale, transportation, delivery, possession, advertisement, exportation, and importation, of
32 intoxicating liquors for beverage purposes, except where authorized by permit from proper Federal authorities, and to provide penalties for the violation of this Act, and to provide for the detection, seizure, and disposition of illegally held liquors and apparatus.

Manufacture, sale, etc., of intoxicating liquors prohibited:

Section 1. Be it enacted by the Legislature of Louisiana, that no person shall manufacture, sell, or in any manner dispose of, transport, deliver, or possess intoxicating liquors within this State, export the same from or import the same into this State for beverage purposes.

Permit:

No person shall manufacture, sell, or in any manner dispose of, transport, deliver, or possess intoxicating liquors within this State, export the same from, or import the same into this State for non-beverage purposes, unless he shall be the holder of a legal permit therefor from proper Federal authorities.

Pohibiting advertisement:

Section 2. That no person shall advertise, either directly or indirectly or by any means, the manufacture, sale, or the keeping for sale

of intoxicating liquors in this State for beverage purposes, and no person shall solicit or receive orders for the sale of such liquors for such purposes.

Penalty:

Section 3. That any person who shall violate the provisions of this act by manufacturing, or having in possession for sale, or, by
33 selling intoxicating liquors shall be guilty of a misdemeanor, and upon conviction for the first offense shall be fined not more than five hundred dollars ($500.00), and be imprisoned not less than ten days, nor more than sixty days, and for the second or subsequent offense, shall be fined not less than one hundred dollars ($100.00) nor more than one thousand dollars ($1,000.00) and be imprisoned not less than thirty days nor more than twelve months; and any person who shall otherwise violate the provisions of this act shall, upon conviction, be fined as hereinabove provided or may be imprisoned not exceeding the maximum limits hereinabove provided, or may be both fined and imprisoned, at the discretion of the court.

For family use excepted:

Section 4. That nothing in this act shall be construed to forbid the possession of intoxicating liquors in one's private dwelling or abode while the same is occupied by him as such a dwelling, provided, such intoxicating liquors were legally acquired and are only for personal consumption by the owner thereof and his family residing in such dwelling and his bona fide guest when entertained by him therein.

Beer and wine:

Nothing in this act shall be construed to prevent a citizen who is a householder from brewing beer and fermenting wine for the use of himself and his family in his home and his bona fide guest entertained in such home.

Search & seizure:

Section 5. That no suspected place other than such as is open
34 to the public shall be invaded and searched except by an officer designated in a search warrant issued by a competent court having the power of a committing magistrate upon the filing with said court of an affidavit reciting the facts that affiant has reasons to believe and believes that such designated place is being utilized as a site for the violation of the provisions of this act, together with such additional evidence as the court may require to make out a prima facie case, and no house, room, or apartment used as, or which is apparently is, a bona fide residence, shall be subject to invasion and search, except by an officer designated in a search warrant issued by a competent court having the powers of a committing magistrate upon the filing in said court of an affidavit by two reliable persons reciting that they have reasons to believe and do believe that said place of residence is being used as a cloak or cover for a violation of the provisions of this act, and reciting the specific violation being committed therein, together with such additional corroborating evidence as the

court may, in its discretion, require to establish the probable existence of the alleged violation of this act. The warrant shall be directed to a duly authorized peace officer and the premises described in the warrant shall be searched and all intoxicating liquors, stills, equipment, apparatus, containers, bottles, etc., or any property used or designed or intended to be used in the manufacture or sale of intoxicating liquors on said premises shall by such officer be seized and the keeper of such place or the person to whom such liquor or property belongs shall be apprehended and brought before the court issuing the warrant to abide the further orders of the court. The officers to whom the search warrant is directed shall make proper returns on the
35 warrant of the action taken thereunder, describing the liquors or property seized, if any, and liquors or property so seized shall be held by such officers without the right of being released upon writ or claim, except liquors seized in a bona fide dwelling house, which liquors shall be released to its owner upon his giving bond, with good and valid surety, for the value of such liquors, conditioned upon the return of such liquors to such officer upon the order of the court. The court, after the trial of the accused, shall order all liquors and property illegally held by the accused at the time of seizure to be immediately and publicly destroyed, by the sheriff or peace officer designated by the court.

The court shall preserve in its records subject to inspection at any time by the public, the affidavits hereinabove referred to. If it should appear that the person or persons making said affidavit had done so maliciously, or without probably cause, and any house, room or apartment used as a bona fide residence is searched by reason of the issuance of a search warrant as the result of the said affidavit, the person or persons making said affidavit shall be deemed guilty of a misdemeanor, and no conviction shall be fined not more than five hundred dollars, or imprisoned for not less than ten days nor more than sixty days or both fine and imprisonment at the discretion of the court.

Duty of sheriff and other authorities:

Section 6. That when any sheriff or any other duly constituted peace officer of this State shall discover any person in the act of transporting, in violation of the law, intoxicating liquors in any vehicle, or otherwise, it shall be the duty of such officer to seize the intoxicating liquors found therein and being transported contrary to law, and arrest any person in charge thereof. The
36 person so arrested shall be proceeded against under the provisions of this act, and after the trial of the charges against him the liquors so seized, if held by court to have been illegally transported, shall be ordered by the court to be immediately and publicly destroyed by the sheriff or other peace officers designated by the court, provided the provisions of this section shall not apply to a person who is in the possession of liquors herein recognized

and permitted and who transports same for personal use and consumption only.

Fines to be paid over to "sheriff's salary fund":

Section 7. That the fines collected from convictions for violations of this act, shall be paid into the parish treasury, and the whole or any part thereof may be appropriated to the "sheriff's salary fund," to be disbursed according to law; provided that upon the recommendation of the district attorney and the order of the judge, the police jury shall appropriate such a part thereof, as may be directed by such order to the "sheriff's salary fund."

Liquor defined:

Section 8. That the word "liquor" or the phrase "intoxicating liquor" wherever used in this act shall be construed to include alcohol, whiskey, brandy, rum, gin, beer, ale, porter, wine, and any spirituous vinous malt or fermented liquor or liquids by whatever name called, as defined by Federal legislation, and all alcoholic liquids, either medicated, proprietary, or patented, which are fit for use as a beverage or for intoxicating beverage purposes, all as defined by Federal legislation.

37 Person defined:

The word "person" shall mean natural persons, associations, copartnerships, corporations, and their clerks, officers, agents, and servants.

The word "vehicle" shall include all such means of transportation as a buggy, wagon, automobile, truck, water, or aircraft, etc.

Investigations:

Section 9. That it shall be the duty of the district judges of the several district courts of this State to charge each grand jury to make special investigation concerning violations of this act and to report to the court of such actions as is taken.

Existing act not effected:

Section 10. This act shall in no way repeal any part of Act No. 8 of the special session of the General Assembly of 1915, approved July 9th, 1915, commonly called "the blind tiger act" and Act No. 14 of the regular session of the General Assembly of 1916, commonly called the "near beer act." All other laws or parts of laws in conflict with the provisions of this act be and they are hereby repealed.

Approved: By the lieutenant governor and acting governor. November 16, 1921.

A true copy.

JAMES J. BAILEY,
Secretary of State.

38 In United States District Court

Joint motion for findings of fact and order granting same

Filed Mar. 19, 1929

Now comes plaintiff and defendant through their respective counsel and jointly move that the court find the facts to be as stipulated herein.

(Signed) T. M. LOGAN BRUNS,
Of Counsel for the United States.
(Signed) E. HOWARD M'CALEB, JR.,
Of Counsel for Defendant.

Granted.

(Sgd.) BEN C. DAWINS, *Judge.*

In United States District Court

Motion for plaintiff for conclusions of law and judgment

Filed Mar. 19, 1929

Motion of plaintiff for conclusions of law and judgment.

Now comes the plaintiff, the United States of America, by its attorney, T. M. Logan Bruns, assistant United States attorney for the Eastern District of Louisiana, and after the conclusion of the
39 evidence and before judgment rendered by the court, respectfully moves the court to find from the evidence in this case the following conclusions of law and judgment in favor of the plaintiff, a stipulation of the facts having been previously filed herein and now being made a part of this motion.

1. That by reason of defendant selling in his said restaurant as appears from the stipulation of facts filed herein, distilled spirits in less quantity than five wine gallons at the same time, to wit: nine (9) drinks of whiskey of October 10, 1924; five (5) drinks of whiskey on October 23, 1924; two (2) drinks of apricot brandy on October 24, 1924; four (4) drinks of benedictine on April 23, 1925, and three (3) drinks of whiskey and five (5) ounces of whiskey on April 25, 1925, the defendant became and was, on the aforesaid dates, a retail liquor dealer, subject to the payment of a tax as such, to plaintiff, as provided by section 3244 of the United States Revised Statutes as amended. (See U. S. C. A. Title 26, sections 202 and 205) and doubled under section 35 of Title II of the act approved October 28, 1919, known as the national prohibition act, in the sum of thirty-seven dollars and fifty cents ($37.50) being the special tax of a retail liquor dealer for nine (9) months, ending June 30, 1925.

Granted.

(Sgd.) BEN C. DAWKINS, *Judge.*

2. That the aforsaid retail liquor dealer's tax was due and payable to plaintiff by this defendant on October 10, 1924, and defendant

was required, as provided by section 53 of act of October 1, 1890, 26 Stat. L. 624, to make and file a return on that date, but
40 defendant failed so to do has so failed up to this date and thereby has incurred an additional tax penalty, which is due and payable to plaintiff as provided by section 3176 of the United States Revised Statutes, as amended, in the sum of four dollars and sixty-eight cents ($4.68).

Granted.

(Sgd.) BEN C. DAWKINS, *Judge.*

3. That by reason of the sales of intoxicating liquor as set forth in the stipulation of facts filed herein, this defendant did carry on, on the dates set forth in said stipulation the business of a retail liquor dealer, as defined in section 3244 of the United States Revised Statutes as amended (U. S. C. A. Title 26, sec. 205), and contrary to the law of the State of Louisiana, and incurred thereby a special tax in the sum of fifteen hundred ($1,500.00) dollars which is due and payable to plaintiff as provided by section 701 of the revenue act of 1924, in lieu of section 1001 of the revenue act of 1921, which was in turn in lieu of section 1001 of the revenue act of 1918, and doubled under section 35 of Title II of the act approved October 28, 1919, known as the national prohibition act.

Granted.

(Sgd.) BEN C. DAWKINS, *Judge.*

4. That by reason of the sales of intoxicating liquor as set forth in the stipulation of facts filed, defendant became and was, a retail liquor dealer and as set forth in section 35 of Title II of the
41 act, approved October 28, 1919, known as the national prohibition act, became liable to plaintiff in the penal sum of five hundred ($500.00) dollars, as provided by the said section 35.

Granted.

(Sgd.) BEN C. DAWKINS, *Judge.*

5. That plaintiff is entitled to judgment in his favor as prayed for, and that judgment be entered accordingly with costs.

Granted.

(Sgd.) BEN C. DAWKINS, *Judge.*
(Sgd.) T. M. LOGAN BRUNS,
Of Counsel for the United States.

In United States District Court

Case called, argued, & submitted

This cause came on to be heard on the pleadings and agreed stipulations of facts, counsel for the respective parties having also filed a stipulation waiving trial by jury.

42 Present: T. M. Logan Bruns, assistant United States attorney, for petitioner.

Present: E. Howard M'Caleb, jr., appearing for the defendant.

and was argued by counsel for the respective parties, in interest, and submitted, when the court took time to consider.

7

In United States District Court

Opinion

Filed May 28, 1929

DAWKINS, J.:

In the above numbered and entitled cause, after careful examination of the matter upon the agreed statement of facts, I am of the opinion that the plaintiff is entitled to a judgment as prayed for. Proper decree may be presented and the right of the defendant to prepare and present his exceptions will be reserved until the decree has been signed.

Done and signed at Monroe, Louisiana, in chambers on this the 27th day of May, A. D. 1929.

(Sgd.) BEN C. DAWKINS,
U. S. D. J.

43 In United States District Court

Motion for a new trial

Filed Jun. 7, 1929

Comes now the defendant, Anthony LaFranca, through undersigned counsel, and moves the court for a new trial, and for causes thereof, says:

1. The judgment of the court is contrary to the law and to the evidence.

2. The court erred in overruling the defendant's plea of former jeopardy, and the court erred in not sustaining the same.

3. The court erred in overruling the defendant's plea of res adjudicata, and the court erred in not sustaining the same.

4. The court erred in not holding section 701, paragraph nine, of the revenue act of 1924 unconsitutional on the grounds and for the reasons as set forth in defendant's supplemental answer, and the court erred in ruling that said section 701, paragraph nine, of the revenue act of 1924 was constitutional.

Wherefore, the defendant prays that upon due consideration that the court grant a new trial herein on the grounds and for the errors committed in the trial of this cause, all as above set forth.

(Signed) MCCALEB & MCCALEB,
Attorneys for Defendant.

44 In United States District Court

Hearing on motion for new trial and order denying same

June 27, 1929

This cause came on this day to be heard upon the motion filed on behalf of the defendant for a new trial herein:

Present: E. Howard McCaleb, jr., attorney for defendant.

Present: T. M. Logan Bruns, Esq., asst. U. S. attorney appearing on behalf of the plaintiff, defendant in rule.

Whereupon, after hearing said rule and arguments of counsel for the respective parties,

It is ordered that said motion be and the same is overruled, to which ruling counsel for defendant reserved a bill of exception.

45 In United States District Court

Judgment

May 27, 1929

This cause having come on regularly for trial before the court without a jury, the same having been waived by stipulation filed in writing by the respective parties and having been submitted for decision on an agreed statement of facts and the court having heard arguments of counsel and having duly considered the same;

It is ordered, adjudged, and decreed for the written reasons on file herein, that there be judgment in favor of the plaintiff, United States of America, and against the defendant, Anthony LaFranca, in the full sum of two thousand and forty-two and 18/100 ($2,042.18) dollars, and all costs of this proceeding.

Judgment rendered May 27, 1929.

Judgment signed June 27, 1929.

(Signed) BEN C. DAWKINS, *Judge.*

46 In United States District Court

Petition for appeal and order allowing same

Filed June 27, 1929

The petition of Anthony LaFranca, defendant herein, respectfully shows:

That petitioner is aggrieved by the judgment and decree herein rendered on June 27th, 1929, in favor of the United States and against said defendant in the sum of two thousand and forty-two and 18/100 ($2,042.18) dollars, and that petitioner for the reasons specified in the assignment of errors filed herein desires to appeal from

said judgment, and desires that said appeal, returnable to the United States Circuit Court of Appeals for the Fifth Circuit, shall operate as a supersedeas and may suspend, during the pendency of said appeal, the effect of said judgment.

Wherefore, petitioner prays that the said appeal may be allowed, and that upon his giving bond in an amount to be fixed by this court the said appeal may operate as a supersedeas and may suspend, during the pendency of said appeal, the effect of said judgment; that said appeal be made returnable to the United States Circuit Court of Appeals for the Fifth Circuit according to law, and that a transcript of the record, proceedings, papers, and exhibits upon which said judgment was rendered duly authenticated be sent to said Circuit Court of Appeals.

(Signed) M'CALEB & M'CALEB,
(Signed) E. HOWARD M'CALEB, JR.,
Attorneys for Petitioner.

47 *Order allowing appeal with supersedeas*

Considering the foregoing petition this day presented, it is ordered that an appeal be allowed to Anthony LaFranca, petitioner herein, and defendant in this suit, from the judgment of June 27th, 1929, rendered against said defendant in the above entitled and numbered cause and that said appeal shall be returnable to the United States Circuit Court of Appeals for the Fifth Circuit, and that upon the execution of a bond in the sum of $2,500.00 to be approved by the clerk of court appeal shall operate as a supersedeas of said judgment and shall suspend until the final judgment or appeal herein, the effect of said judgment herein, and that a transcript of the record be filed in the United States Circuit Court of Appeals for the Fifth Circuit according to law as prayed for.

New Orleans, La., June 27, 1929.

(Signed) BEN C. DAWKINS,
United States District Judge.

In United States District Court

Assignment of errors

Filed June 27, 1929

The defendant in this cause in connection with his petition for an appeal makes the following assignments of error which he avers occurred upon the trial of this cause, to wit:

48 (1) The court erred in overruling the defendant's plea of former jeopardy, and the court erred in not sustaining the same.

(2) The court erred in overruling the defendant's plea of res adjudicata, and the court erred in not sustaining the same.

(3) The court erred in not holding section 701, paragraph 9, of the revenue act of 1924 unconstitutional, and as violative of the tenth amendment of the Constitution of the United States, and the court erred in ruling that said section 701, paragraph 9, of the revenue act of 1924 was constitutional.

(4) The court erred in overruling the defendant's motion for a new trial.

Wherefore, the defendant prays that the judgment of the District Court may be reversed.

(Signed) M'CALEB & M'CALEB,
(Signed) E. HOWARD M'CALEB, Jr.,
Attorneys for Defendant.

In United States District Court

Certificate of judge to file exceptions

Filed June 27, 1929

Thereafter on the 27th day of June, 1929, and within the time allowed by said United States District Court the defendant duly tendered his bill of exception herein, which having been seen
49 and examined by the court and counsel, is by the court allowed and approved, and the said bill of exception is signed and sealed by the Honorable Ben C. Dawkins, judge of said court before whom said proceedings were had, and the same is ordered by said court to be filed and made part of the record herein, which is now accordingly done.

Given under the hand and seal of the judge of said court before whom proceedings were had on this 27th day of June, 1929.

(Signed) BEN C. DAWKINS,
Judge United States District Court for the Eastern District of Louisiana.

The above and foregoing bill of exception is hereby approved.

(Sgd.) T. M. LOGAN BRUNS,
Asst. United States Attorney.
(Sgd.) M'CALEB & M'CALEB,
(Sgd.) E. HOWARD M'CALEB, Jr.,
Attorneys for Defendants.

Let the bills be filed and the filing shown of record as of this 27th day of June, 1929.

(Signed) BEN C. DAWKINS, *Judge.*

In United States District Court

Bill of exception and order approving same

Filed June 27, 1929

Be it remembered, that on the trial of the petition in this cause, and in this court, at the February term, 1929, the Honorable Ben C. Dawkins, judge presiding, the following proceedings were had, to wit:

50 The jury was waived by written stipulation between counsel as provided for by section 649, United States Revised Statutes, and the case submitted to the court on a stipulation or agreement of facts, which is attached hereto and made part of this bill of exceptions.

Thereafter the matter being submitted to the court on a stipulation of facts, as aforesaid, the court having found the facts to be as stipulated granted plaintiff's motion for conclusions of law and judgment and gave judgment in favor of the plaintiff in the sum prayed for, to which action of the court counsel for the defendant then and there excepted, and still excepts, and he thereupon filed a motion for a new trial which being overruled by the court was duly excepted to.

And now in furtherance of justice and that right may be done the defendant Anthony LaFranca tenders and presents the foregoing as his bill of exception in this cause to the action of the court, and prays that the same may be allowed, signed and sealed by the court, and made part of the record and the same is accordingly done this 27th day of June, 1929.

(Signed) BEN C. DAWKINS,
Trial Judge.

[Supersedes bond on appeal for $2,500.00 approved and filed July 3, 1929; omitted in printing.]

51–52 In United States District Court

Pracipe for transcript of record

Filed July 16, 1929

Hon. H. J. CARTER,
Clerk, U. S. District Court, New Orleans, Louisiana.

DEAR SIR: In making up the transcript of record on the appeal taken in the above entitled and numbered cause, please include the following:

1. Petition and affidavit.
2. Special demurrer of defendant.

53 3. Plea of former jeopardy of defendant.

4. Hearing on special demurrer and plea of former jeopardy and submission.

5. Order dismissing special demurrer and denying plea of former jeopardy.
6. Opinion of the court.
7. General demurrer of defendant.
8. Plea of res adjudicata.
9. Hearing on general demurrer and res adjudicata and submission.
10. Order overruling general demurrer and plea of res adjudicata.
11. Answer of defendant.
12. Supplemental answer of defendant and order.
13. Stipulation of counsel waiving trial by jury.
14. Stipulation of facts and exhibit attached.
15. Joint motion for findings of fact.
16. Motion of plaintiff for conclusions of law and judgment.
17. Case called, argued, and submitted.

54 18. Opinion of the court.

19. Motion for new trial.
20. Hearing on motion for new trial and order overruling same.
21. Judgment.
22. Petition for appeal and order allowing same.
23. Assignment of errors.
23½. Certificate of judge to file exceptions.
24. Bill of exceptions.
25. Appeal bond.
26. This praecipe.

Respectfully,

(Sgd.) E. HOWARD M'CALEB, JR.,
Attorney for Appellant.

Approved:

T. M. LOGAN BRUNS,
Assistant U. S. Attorney.

55 [Clerk's certificate to foregoing transcript omitted in printing.]

Original citation omitted from the printed record, the original thereof being on file in the office of the clerk of the U. S. Circuit Court of Appeals.

* * * * * * *

56 [Minute entry of argument and submission, Dec. 9, 1929, omitted in printing.]

57 Filed January 7, 1930

In United States Circuit Court of Appeals for the Fifth Circuit

No. 5654

ANTHONY LA FRANCA, APPELLANT

VERSUS

UNITED STATES OF AMERICA, APPELLEE

Appeal from the District Court of the United States for the Eastern District of Louisiana

E. Howard McCaleb, jr., for appellant.

T. M. Logan Bruns, asst. U. S. atty. (Edmond E. Talbot, U. S. atty., and T. M. Logan Bruns, asst. U. S. atty, on the brief), for appellee.

Before WALKER, BRYAN, and FOSTER, Circuit Judges

Opinion

WALKER, Circuit Judge:

This was an action against the appellant to recover the tax imposed on retail liquor dealers by § 3244 of the Revised Statutes, the amount of which is increased by § 35 of the national prohibition act, the penalty for failure to make return required by statute, and the additional penalty of $500.00 on retail liquor dealers prescribed by § 35 of the national prohibition act. The claims asserted were based upon described sales of whiskey by appellant on October 10, 1924, October 23, 1924, and April 25, 1925, upon described sales of apricot brandy by appellant on October 24, 1924, and upon a described sale of benedictine by the appellant on April 23, 1925. The granting of the relief sought was resisted on the ground that prior to the institution of the suit appellant had been convicted and sentenced under an information charging him with possessing intoxicating liquor, with maintaining a common nuisance, and with selling intoxicating liquor, which charges were based on the same sales which were alleged in the petition in this case. The court ruled against the defense so set up, and, upon the parties stipulating in writing that a jury be waived and that the facts were substantially as alleged in the petition and in the pleading setting up the above-mentioned de-
58 fense, the court rendered judgment in accordance with the prayer of the petition.

The so-called taxes and other charges retained in force by section 35 of the national prohibition act and section 5 of the Willis-Campbell Act (42 Stat. 223) are penalties or fines imposed as punishment for criminal misconduct. Lipke v. Lederer, 259 U. S. 557; Regal Drug Co. v. Wardell, 260 U. S. 386. Section 5 of the Willis-Campbell Act contains the following provision: "That all

laws as to the manufacture and taxation of and traffic in intoxicating liquor, and all penalties for violations of such laws that were in force when the national prohibition act was enacted shall be and continue in force, as to both beverage and nonbeverage liquor, except such provisions of such laws as are directly in conflict with any provision of the national prohibition act or of this act; but if any act is a violation of any of such laws and also of the national prohibition act or of this act, a conviction for such act or offense under one shall be a bar to a prosecution therefor under the other."

The conviction of appellant was for violations of the national prohibition act, §§ 21, 25, and 29. The so-called tax sought to be enforced by this suit was imposed by section 3244 of the Revised Statutes, but the amount of it was increased by the provision contained in section 35 of the national prohibition act. But for laws which were in existence prior to the enactment of the national prohibition act appellant would not have been liable for the amounts sought to be recovered in this suit, as only preexisting laws provide for a tax on retail liquor dealers and a penalty for a failure to make return. The conviction of the appellant having been for acts which were violations of the national prohibition act, and the purpose of this suit being to subject appellant to liabilities for the same acts, created by preexisting laws referred to in the above-set-out provision, that conviction was a bar to this suit if this suit, within the meaning of that provision, is a prosecution, for those acts. The use of the word "prosecution" in describing what is barred by a conviction for a violation of one of the laws referred to in the above-set-out provision is consistent with the absence of intention to refer only to proceedings commenced by an indictment or information, or on the criminal side of a court. In ordinary usage that word has different meanings when used in different relations. It properly may be used to describe or include a proceeding on the civil side of a court. Salinger v. Loisel, 265 U. S. 224, 236; 32 Cyc. 727.

59 The provision in question clearly discloses a purpose to restrict the punitive consequences of an act which is a violation of both a recently enacted statute mentioned and of a previously enacted statute which was continued in force. It affords to one who has been convicted protection against further proceedings to subject him to punishment for the same act or offense. When a statutory provision deals with such a subject as double punishment for the same act or offense, which has long been recognized to be at variance with right and justice, an intention to make the benefit of the protection provided for dependent upon the form of proceeding resorted to for the enforcement of additional punishment is not to be attributed to the lawmakers unless such intention is disclosed. United States v. Chouteau, 102 U. S. 603, 611. A penalty imposed for criminal misconduct is none the less punitive by reason of the fact that it may be enforced by a proceeding civil in form. This suit as clearly seeks to subject appellant to additional punishment for the acts for which he was convicted as would have been

sought by an indictment or information based on the same acts In our opinion nothing in the language of the provision in questio warrants such a sacrifice of substance to mere form as would be involved by holding that this suit is not barred, because, though i seeks to subject appellant to punishment for the same acts for which he was convicted, it was in form a civil proceeding.

We conclude that the above-set-out provision has the effect o making the above-mentioned conviction of the appellant a bar t this suit. The court erred in ruling otherwise. The judgment i reversed.

60 In United States Circuit Court of Appeals

No. 5654

ANTHONY LAFRANCA

VERSUS

UNITED STATES OF AMERICA

Judgment

January 7, 1930

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Eastern District of Louisiana, and was argued by counsel.

On consideration whereof it is now here ordered and adjudged by this court, that the judgment of the said District Court in this cause be, and the same is hereby, reversed.

61 [Clerk's certificate to foregoing transcript omitted in printing.]

62 Supreme Court of the United States

Order allowing certiorari

Filed May 5, 1930

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

[Indorsement on cover:] File No. 34931. U. S. Circuit Court of Appeals, Fifth Circuit. Term No. 800. The United States of America, petitioner, vs. Anthony LaFranca. Petition for writ of certiorari and exhibit thereto. Filed April 7, 1930. File No. 34931.

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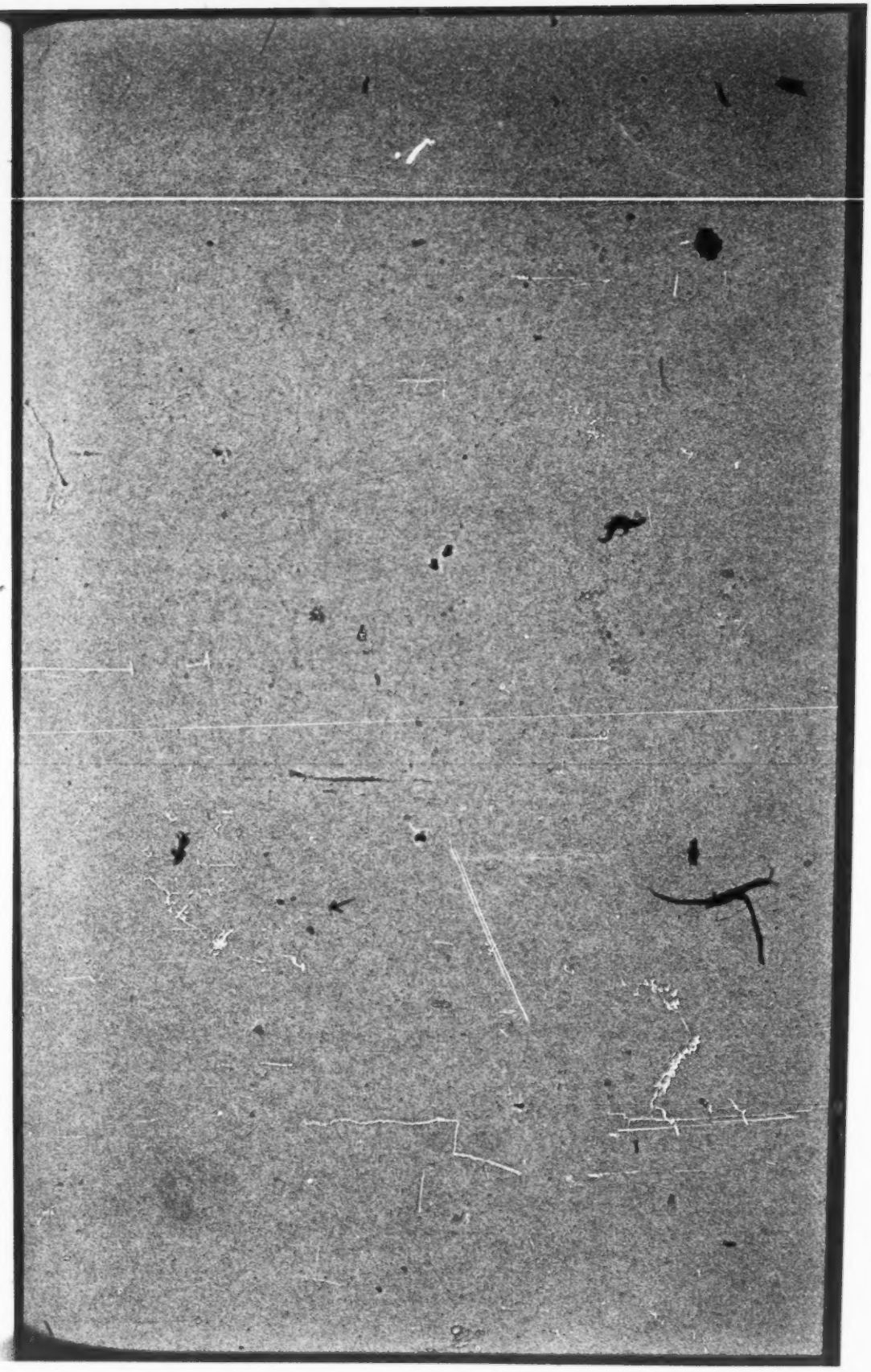

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In the Supreme Court of the United States

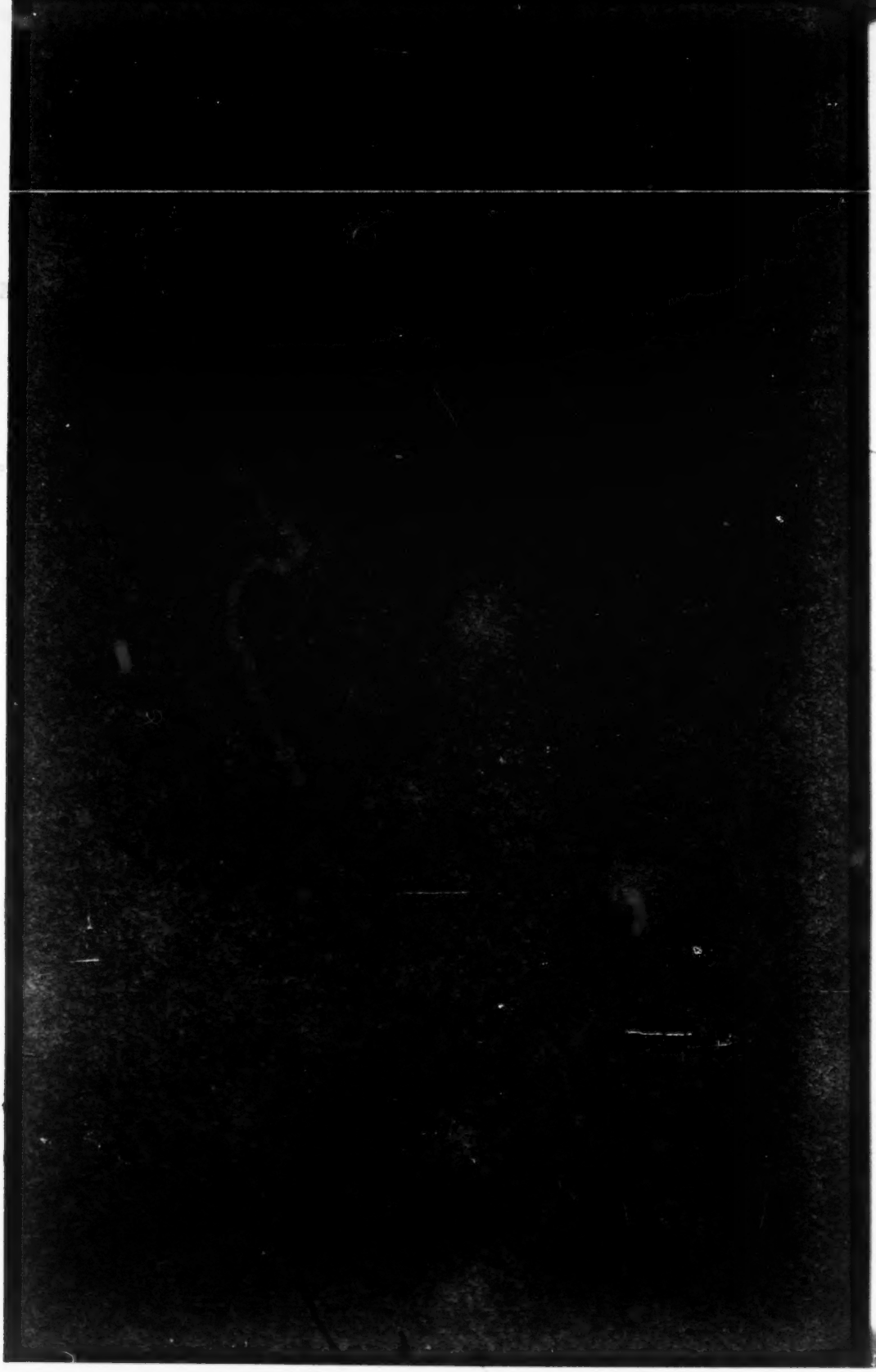
OCTOBER TERM, 1929

UNITED STATES OF AMERICA, PETITIONER

v.

ANTHONY LA FRANCA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT AND BRIEF IN SUPPORT THEREOF



INDEX

	Page
Petition:	
Questions presented	1
Statutes involved	2
Statement	5
Specification of error to be urged	7
Reasons for granting the writ	7
Brief in support:	
Opinions below	10
Jurisdiction	10
Question presented, statutes involved, etc	10
Argument:	
I. The suit is not barred by section 5 of the Willis-Campbell Act	10
II. There is no double jeopardy	15
III. Paragraph 9, section 701 of the revenue act of 1924 is constitutional	21
Conclusion	25

CITATIONS

Cases:	
Albrecht v. *United States*, 273 U. S. 1	15
Clark Distilling Co. v. *Western Maryland Ry. Co.*, 242 U. S. 311	22, 23
Coffey v. *United States*, 116 U. S. 436	20
Everard's Breweries v. *Day*, 265 U. S. 545	23
Feinberg v. *United States*, 2 F. (2d) 955	15
Graham v. *West Virginia*, 224 U. S. 616	19
Haddad v. *State*, 23 Ariz. 105	16
Hebert v. *Louisiana*, 272 U. S. 312	15
Hepner v. *United States*, 213 U. S. 103	18
Leszynsky, In re, Fed. Cas. No. 8,279	17
License Tax Cases, 5 Wall. 462	21
Lipke v. *Lederer*, 259 U. S. 557	12
Murphy v. *United States*, 272 U. S. 630	20
National Prohibition Cases, 253 U. S. 350	23
People v. *Meakin*, 133 N. Y. 214	16
Regal Drug Co. v. *Wardell*, 260 U. S. 386	12
Rosen v. *United States*, 271 Fed. 651	15
Selzman v. *United States*, 268 U. S. 466	23
State v. *Zywicki*, 175 Minn. 508	19
Stout v. *State*, 36 Okla. 744	16

Cases—Continued.

United States v. *Bullinger*, 290 Fed. 395 19
United States v. *Cases of Champagne*, 9 F. (2d) 710 20
United States v. *Chouteau*, 102 U. S. 603 ..... 20, 21
United States v. *Gates*, Fed. Cas. No. 15,191 20
United States v. *Hill*, 248 U. S. 420 23
United States v. *McKee*, Fed. Cas. No. 15,688 20
United States v. *Mt. Clemens Beverage Co.*, 23 F. (2d) 885 19
United States v. *One Ford Coupe*, 272 U. S. 321 9
United States v. *Three Copper Stills*, 47 Fed. 495 18
United States v. *Trobe*, Fed. Cas. No. 16,541 18
United States v. *Yuginovich*, 256 U. S. 450 14
Vamvas v. *United States*, 13 F. (2d) 347 15

Statutes:

R. S., secs. 563 (3), 919 (U. S. C., title 28, sec. 41 (9), 732) 18
R. S., secs. 3213–3215 (U. S. C., title 26, secs. 142–145) 18
Webb-Kenyon law (act of March 1, 1913), c. 90, 37 Stat. 699 22
Reed amendment (act of March 3, 1917), c. 162, 39 Stat. 1058, 1069 23
National prohibition act, Title II, sec. 35, 41 Stat. 305, 317 (U. S. C., title 27, sec. 52) 2
Willis-Campbell Act, c. 134, 42 Stat. 222, 223 (U. S. C., title 27, sec. 3) 3
Revenue act of 1924, c. 234, sec. 701, par. 9, 43 Stat. 327 (U. S. C., title 26, sec. 206) 4

Miscellaneous:

H. Rept. No. 224, 67th Cong., 1st sess., p. 3 8
Bishop on Crim. Law, 9th Ed., sec. 990 (2) 16

In the Supreme Court of the United States

OCTOBER TERM, 1929

No. 800

UNITED STATES OF AMERICA, PETITIONER

v.

ANTHONY LA FRANCA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT AND BRIEF IN SUPPORT THEREOF

PETITION

The Attorney General, on behalf of the United States of America, prays that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Fifth Circuit, entered in the above-entitled cause on January 7, 1930, reversing the judgment of the District Court of the United States for the Eastern District of Louisiana.

QUESTIONS PRESENTED

1. Whether an action under Section 35, Title II, of the National Prohibition Act, to recover "double taxes," and a penalty alleged to be due because of

criminal acts for which the defendant has been convicted under that Act is barred by Section 5 of the Willis-Campbell Act.

2. Whether a civil proceeding for the recovery of taxes and penalties is barred by a prior conviction of an offense based upon the same acts for which the taxes and penalties are sought to be recovered.

3. Whether Paragraph 9 of Section 701 of the Revenue Act of 1924 is constitutional.

STATUTES INVOLVED

Section 35, Title II, of the National Prohibition Act, c. 85, 41 Stat. 305, 317 (U. S. C., Title 27, Sec. 52) provides:

> All provisions of law that are inconsistent with this Act are repealed only to the extent of such inconsistency and the regulations herein provided for the manufacture or traffic in intoxicating liquor shall be construed as in addition to existing laws. This Act shall not relieve anyone from paying any taxes or other charges imposed upon the manufacture or traffic in such liquor. No liquor revenue stamps or tax receipts for any illegal manufacture or sale shall be issued in advance, but upon evidence of such illegal manufacture or sale a tax shall be assessed against, and collected from, the person responsible for such illegal manufacture or sale in double the amount now provided by law, with an additional penalty of $500

on retail dealers and $1,000 on manufacturers. The payment of such tax or penalty shall give no right to engage in the manufacture or sale of such liquor, or relieve anyone from criminal liability, nor shall this Act relieve any person from any liability, civil or criminal, heretofore or hereafter incurred under existing laws.

* * * * *

Section 5 of the Willis-Campbell Act, c. 134, 42 Stat. 222, 223 (U. S. C., Title 27, Sec. 3) provides:

That all laws in regard to the manufacture and taxation of and traffic in intoxicating liquor, and all penalties for violations of such laws that were in force when the National Prohibition Act was enacted, shall be and continue in force, as to both beverage and nonbeverage liquor, except such provisions of such laws as are directly in conflict with any provision of the National Prohibition Act or of this Act; but if any act is a violation of any of such laws and also of the National Prohibition Act or of this Act, a conviction for such act or offense under one shall be a bar to prosecution therefor under the other. All taxes and tax penalties provided for in section 35 of Title II of the National Prohibition Act shall be assessed and collected in the same manner and by the same procedure as other taxes on the manufacture of or traffic in liquor.

* * * * *

Section 701, Paragraph 9, of the Revenue Act of 1924, c. 234, 43 Stat. 253, 327 (U. S. C., Title 26, Sec. 206) provides:

> Every person carrying on the business of a brewer, distiller, wholesale liquor dealer, retail liquor dealer, wholesale dealer in malt liquor, retail dealer in malt liquor, or manufacturer of stills, as defined in section 3244 as amended and section 3247 of the Revised Statutes, in any State, Territory, or District of the United States contrary to the laws of such State, Territory, or District, or in any place therein in which carrying on such business is prohibited by local or municipal law, shall pay, in addition to all other taxes, special or otherwise, imposed by existing law or by this Act, $1,000. The payment of the tax imposed by this subdivision shall not be held to exempt any person from any penalty or punishment provided for by the laws of any State, Territory, or District for carrying on such business in such State, Territory, or District, or in any manner to authorize the commencement or continuance of such business contrary to the laws of such State, Territory, or District, or in places prohibited by local or municipal law.
>
> The taxes imposed by this section shall, in the case of persons upon whom a corresponding tax is imposed by section 1001 of the Revenue Act of 1921, be in lieu of such tax.

STATEMENT

Suit was instituted November 9, 1927, by a petition in the District Court to recover from the respondent $2,042.18 in taxes and penalties. The petition alleged in substance that the defendant on specified dates within the period from October 10, 1924, to April 25, 1925, sold intoxicating liquor in a certain restaurant of which he was proprietor to persons named; that by reason of such sales he had become a retail liquor dealer subject to the following taxes for the nine months ending June 30, 1925: Retail liquor dealer's tax, imposed by Section 3244, Revised Statutes, doubled under Section 35, Title II, of the National Prohibition Act, $37.50; a penalty, imposed by Section 3176, Revised Statutes, as amended, for failure to make and file a return on October 10, 1924, $4.68; a special tax imposed by Section 701 of the Revenue Act of 1924 for engaging in the business of a retail liquor dealer in the State of Louisiana contrary to the law of that State, doubled under said Section 35, $1,500; and a penalty imposed by Section 35 upon retail dealers selling intoxicating liquor in violation of the National Prohibition Act, $500. The petition further averred that in case No. 10124 on the docket of that court the defendant had on April 28, 1926, pleaded guilty to the charge of selling liquor. (R. 1–9.)

By plea of former jeopardy, general demurrer, and plea of *res adjudicata*, the defendant sought to have the suit dismissed on the grounds: (1) That

the charges to which he had pleaded guilty in case No. 10124, and upon which there had been a judgment of conviction and a sentence of fine and imprisonment, were identical with and provable by the same evidence as were the charges upon which the taxes and penalties were sought to be recovered, and (2) that the action was barred by Section 5 of the Willis-Campbell Act. (R. 10, 19, 20.) These pleas were overruled. (R. 13–14, 22.) Thereafter an answer and supplemental answer were filed alleging that Paragraph 9 of Section 701 of the Revenue Act of 1924 was unconstitutional in that it imposed a penalty for violation of State law. (R. 22–27.) A jury was waived and a stipulation of facts filed (R. 27–37) substantially the same as those alleged in the petition (R. 30). Judgment was entered upon the facts stipulated for the full sum of the taxes and penalties (R. 45), and a motion for a new trial denied (R. 43, 44).

Except for the claim of unconstitutionality of Section 701 of the Revenue Act of 1924, which was overruled without opinion, the judgment was obviously based upon the reasons given by the court in denying the plea of former jeopardy. (R. 14–18.)

The defendant took the case to the Circuit Court of Appeals, assigning as errors the action of the District Court: (1) In overruling the plea of former jeopardy; (2) in overruling the plea of *res adjudicata;* (3) in not holding that Paragraph 9 of Section 701 of the Revenue Act of 1924 was un-

constitutional; and (4) in denying the motion for a new trial. (R. 47–48.)

The judgment was reversed by the Circuit Court of Appeals upon the sole ground that the suit was barred by Section 5 of the Willis-Campbell Act. (R. 56–59.)

SPECIFICATION OF ERROR TO BE URGED

The Circuit Court of Appeals erred in holding that the present action to recover double taxes and penalties alleged to be due because of acts for which the defendant had previously been convicted under the National Prohibition Act, is barred by Section 5 of the Willis-Campbell Act.

REASONS FOR GRANTING THE WRIT

A review by this Court of the decision below is of importance in the enforcement of the National Prohibition Act and in the collection of Internal Revenue taxes imposed upon the illicit manufacture, sale, etc., of intoxicating liquor. The reasons advanced to support that decision are not confined to the double taxes and penalties imposed by Section 35, Title II, of the National Prohibition Act, but are sufficiently broad to include the basic taxes under the Internal Revenue laws where their recovery is sought because of acts for which there has been a conviction under the National Prohibition Act. Large sums of money in Internal Revenue taxes and charges, doubled under Section 35, are annually collected from convicted violators of the National Prohibition Act.

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The effect of the decision of the court below is to compel the Government, whenever an act which is a violation of the National Prohibition Act also gives rise to liability for a tax under the Internal Revenue laws, to choose whether it will proceed to collect the tax, or will prosecute the offender. It can not under that decision do both. That this is at variance with the intent of Congress is indicated by the report of the House Judiciary Committee on H. R. 7294, 67th Congress,[1] which later became the Willis-Campbell Act, as well as by the provision of

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[1] In H. Rep. No. 224, 67th Cong., 1st Sess., to accompany H. R. 7294, it was said (p. 3):

"Section 5 has been added to this bill as an amendment to meet a situation created by a decision of the Supreme Court, dated June 1, 1921, in which that court in effect held that the revenue laws applicable to the manufacture, taxation, and traffic in intoxicating liquor for beverage purposes are no longer in force. In the years past it has been deemed necessary to maintain the strictest kind of control over all kinds of liquor to prevent it from being made and sold without the payment of taxes, and there is if anything a greater necessity for such control at this time. There is no practical way of distinguishing between beverage and nonbeverage liquor, and there certainly can be no good reason why the man who makes liquor in violation of law should be dealt with more leniently than the man who makes it for lawful purposes. During the last year the Government collected more than $138,000,000 in revenue from liquor, and there is every reason to believe that the present rate of taxation will be maintained if it is not increased in the next revenue law.

"This section is important for another reason. Section 35 of Title II of the national prohibition act provides for

Section 35, Title II, of the National Prohibition Act, that "This Act shall not relieve anyone from paying any taxes or other charges imposed upon the manufacture or traffic in such liquor." See *United States* v. *One Ford Coupe*, 272 U. S. 321, 326.

Wherefore, it is respectfully submitted that this petition for certiorari to review the judgment of the Circuit Court of Appeals in the above-entitled cause should be granted.

WILLIAM D. MITCHELL,
Attorney General.

APRIL, 1930.

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an additional tax on the illegal manufacture and traffic in liquor over that imposed on liquor lawfully produced and sold. This tax was held to be valid in this decision of the Supreme Court, but decisions have been rendered by various district courts that would indicate that there is no effective remedy for its enforcement. A failure to make suitable provision for the enforcement of these taxes and penalties may mean a loss to the Government of many millions of dollars. There will no doubt be more than $50,000,000 of such taxes assessed before the end of the next fiscal year. The imposition of this tax is one of the most effective remedies against the law violators.

* * * * * * *

"There has been very little opposition to any of the provisions of this bill, and Section 5 is simply seeking to reenact what was believed to be the law at the time the national prohibition act was passed. That act provides, Section 35, Title II, that it shall be construed as an addition to existing laws and that it shall not relieve any person from any liability, civil or criminal, heretofore or hereafter incurred under existing laws."

BRIEF IN SUPPORT OF PETITION

OPINIONS BELOW

The opinion of the District Court (R. 14) is reported in 26 F. (2d) 706, and that of the Circuit Court of Appeals (R. 56) in 37 F. (2d) 269.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered January 7, 1930. (R. 59.) The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED, STATUTES INVOLVED, ETC.

A statement of the questions presented, statutes involved and assignment of error relied upon, as well as a statement of the case, will be found in the petition.

ARGUMENT

I

THE SUIT IS NOT BARRED BY SECTION 5 OF THE WILLIS-CAMPBELL ACT

It should be noted, in the first place, that the contention that this suit is barred by Section 5 of the Willis-Campbell Act was raised by the general demurrer. (R. 19.) As the overruling of that pleading was not included in the assignment of errors (R. 47–48), it would appear that the Circuit

Court of Appeals reversed the judgment on a ground which was not presented by the record for its decision.

Furthermore we submit that the question was erroneously decided. The provision of Section 5 involved is:

> * * * but if any act is a violation of any of such laws [that is, the prior Internal Revenue laws relating to liquor] and also of the National Prohibition Act or of this Act, a conviction for such act or offense under one shall be a bar to prosecution therefor under the other.

Under its plain terms, the foregoing provision applies only where the same act is a "violation" both of the National Prohibition Act or Supplemental Act, and of such antecedent laws, and the bar is against a "prosecution" for "such act or offense" under one of such laws after there has been a conviction therefor under the other. The present suit was brought under Section 35, Title II, of the National Prohibition Act, to recover the double taxes and penalties imposed by that statute because of acts constituting violations of the National Prohibition Act. If, notwithstanding its civil character, the suit be regarded as a "prosecution" for a "violation," within the meaning of Section 5, it is nevertheless (except for the penalty of $4.68 for failure to file a return, imposed by the Internal Revenue laws) a prosecution for a violation of the Act under which the respondent had

been previously convicted, i. e., the National Prohibition Act, and the bar of the statute has, therefore, no application.

The court below sought to bring the case within the bar of Section 5 by the following process of reasoning: (1) The so-called taxes and other charges retained in force by Section 35 of the National Prohibition Act and Section 5 of the Willis-Campbell Act are penalties or fines for criminal misconduct, *Lipke* v. *Lederer*, 259 U. S. 557; *Regal Drug Co.* v. *Wardell*, 260 U. S. 386; (2) a civil suit for the recovery of such a "penalty" may properly be regarded as a "prosecution" for an offense, and (3) the present suit was, therefore, a prosecution which was barred by the statute because the penalties sued for were incurred by reason of acts for which there had been a conviction under the National Prohibition Act.

The chief vice in the foregoing reasoning lies in its second proposition. To have the instant case come within the bar of Section 5, it is not sufficient that it be a prosecution for an offense under either of the two laws; it must be a prosecution for an offense *against the Internal Revenue laws.* There was no attempt in this case to *prosecute* for a *violation* of any of the Internal Revenue laws. The suit was to recover (R. 7–8):

> 1. A special tax as retail liquor dealer under Section 3244, Revised Statutes, doubled under Section 35, Title II, National Prohibition Act.

It was not an offense under Section 3244 to conduct business as a retail liquor dealer. A suit to collect the tax imposed by that section can not, therefore, be regarded as a prosecution for a "violation of any of such laws," within the meaning of Section 5. As to the additional amount resulting from the doubling of the tax, recovery was sought, not under any provision of the Internal Revenue laws, but under Section 35, Title II, of the National Prohibition Act.

> 2. A 25% penalty for failure to make a return as required by Section 3176, Revised Statutes.

A suit to recover such an exaction can hardly be regarded as a criminal prosecution. It is authorized by a provision of Section 3176 empowering the Commissioner of Internal Revenue "to add to the tax 25 per centum of its amount" for failure to file a return within the time prescribed by law.

> 3. A special tax for conducting business as a retail liquor dealer in Louisiana contrary to the laws of that State, imposed under Section 701, Revenue Act of 1924, doubled under Section 35, Title II, National Prohibition Act.

The tax here referred to was authorized by the provision of Paragraph 9, Section 701, of the Revenue Act of 1924, that "Every person carrying on the business of a * * * retail liquor dealer * * * in any State * * * contrary to the laws of such State * * * shall pay, in addition

to all other taxes, special or otherwise, imposed by existing law or by this Act, $1,000." As indicated in the discussion of the first item, *supra,* recovery of the additional amount resulting from the doubling of this tax is not sought under the Internal Revenue laws, but under the National Prohibition Act.

4. A specific penalty for unlawful sales as retail liquor dealer, imposed by Section 35, Title II, National Prohibition Act.

As this penalty was imposed under the National Prohibition Act, the suit for its recovery obviously cannot be regarded as a prosecution for violation of the Internal Revenue laws.

The court treated this case as though it involved only the recovery of penalties under the Internal Revenue laws, and thus put entirely out of view the penalties sought to be recovered under the National Prohibition Act. The reasons given for the court's decision can have no application to the latter.

But finally, even considering the items here involved to be taxes or penalties imposed by the Internal Revenue laws, it could not have been the intent of Congress, in the light of *United States* v. *Yuginovich,* 256 U. S. 450, that a collection under the Internal Revenue laws should bar a criminal prosecution for sale or manufacture under the National Prohibition Act, or *vice versa.*

We submit that the Circuit Court of Appeals erred in holding this action barred by Section 5 of the Willis-Campbell Act.

Although the court below based its decision solely on its construction of Section 5, other questions presented by the assignment of errors are discussed in the following points.

II

THERE IS NO DOUBLE JEOPARDY

Although the respondent assigned as error (R. 47–48) the overruling of his plea of double jeopardy, he failed at the time to except to that action by the court. (R. 13–14.) It would seem, therefore, that this contention is not now available to the respondent. *Rosen* v. *United States* (C. C. A. 2d), 271 Fed. 651, 653; *Feinberg* v. *United States* (C. C. A. 8th), 2 F. (2d) 955, 956–957.

Considering the question on its merits, it should first be noted that in order to establish double jeopardy the subsequent proceeding must be for the same "offense" as that for which the respondent was first placed in jeopardy. *Hebert* v. *Louisiana,* 272 U. S. 312. A single act may be the basis for several offenses. Thus, a conviction for the unlawful sale of liquor will not bar a subsequent prosecution for the unlawful possession of the same liquor. *Albrecht* v. *United States,* 273 U. S. 1. Similarly, a conviction for the sale of cocaine without the vendor being registered will not bar a subsequent prosecution for the sale of the same cocaine without a written order. *Vamvas* v. *United States* (C. C. A. 5th), 13 F. (2d) 347. In the instant case the Government was required to establish not only the unlawful sale of liquor—which alone was neces-

sary for conviction—but also the fact that the respondent was a "retail liquor dealer."

But assuming that the present suit involves the same "offense" as that for which respondent was convicted, Congress may subject any particular offense both to a penalty and a criminal prosecution, and where it is clear that the penalty is intended to be in addition to the criminal prosecution a suit for the recovery of the penalty is not barred by a prior conviction of the defendant of the same offense for which the penalty is alleged to be due. The penalty is merely part of the punishment imposed and it is immaterial that its recovery is sought in a separate action.

The Court of Appeals of New York in *People* v. *Meakim*, 133 N. Y. 214, quoted the statement of the rule in an earlier case as follows (p. 224):

> "It is undoubtedly competent for the legislature to subject any particular offense both to a penalty and a criminal prosecution. It is not punishing the same offense twice. They are but parts of one punishment. They both constitute the punishment which the law inflicts upon the offense. That they are enforced in different modes of proceeding, and at different times, does not affect the principle. It might as well be contended that a man was punished twice when he was both fined and imprisoned, which he may be in most misdemeanors."

See *Stout* v. *State*, 36 Okla. 744; *Haddad* v. *State*, 23 Ariz. 105. See also Bishop on Criminal Law (9th Ed.), Sec. 990 (2).

The same conclusion is reached by the Federal courts. The case of *In re Leszynsky,* Fed. Cas. No. 8,279, involved Section 3318, Revised Statutes, which imposed a penalty of $100, as well as a fine and imprisonment for failure to keep a record of spirits distilled. In holding that a criminal action against the defendant was not barred by a prior civil suit to collect the statutory penalty, Judge Blatchford said (p. 399):

> But, in the eye of the law, the three punishments are only one punishment for the same offence, although the penalty of $100 may be recovered in a civil action, and the fine and imprisonment are inflicted by a criminal prosecution. The statute book has many like provisions for punishment of offences, where a penalty to be recovered by a civil action is given, and a fine and imprisonment, or one of them, on a criminal conviction, is prescribed in addition and cumulatively, by the use of the word "and." Provisions for punishment by the forfeiture of property, which must be enforced in a civil action, and, cumulatively and in addition, by fine and imprisonment, or one of them, on a criminal conviction of the same offence for which the forfeiture of property is prescribed, are of the same character. * * * Penalties and forfeitures given by statute are to be enforced by civil suits. Rev. St. sec. 563, subd. 3; Id. sec. 919. Fine and imprisonment are to be inflicted as the result of a conviction on a criminal prose-

> cution. Different methods are to be resorted to to enforce the different parts of what is one and the same punishment. But, the fact that the two methods may be progressing simultaneously and one be completed before the other, or that one may be fully completed before the other is commenced, cannot have the effect to annul the provision of law in regard to the uncompleted part. * * *

See also *United States* v. *Three Copper Stills,* 47 Fed. 495; *United States* v. *Trobe,* Fed. Cas. No. 16,541.

Section 5 of the Willis-Campbell Act provides:

> All taxes and tax penalties provided for in section 35 of Title II of the National Prohibition Act shall be assessed and collected in the same manner and by the same procedure as other taxes on the manufacture of or traffic in liquor.

Assuming that the taxes and penalties provided by Section 35 are not properly taxes, but penalties or fines for criminal misconduct, nevertheless it seems that the ordinary method of collecting such penalties is by a separate civil suit. R. S., Sections 3213–3215 (U. S. C., Title 26, Sections 142–145); R. S., Sections 563 (3), 919 (U. S. C., Title 28, Section 41 (9), 732). See *Hepner* v. *United States,* 213 U. S. 103. There is no reason why the institution of such a civil proceeding should defeat the legislative intent that the remainder of the statutory punishment be also imposed. There is no

requirement in the double jeopardy provision of the Fifth Amendment that the entire punishment meted out to a defendant for the commission of an offense be determined in one judicial proceeding. This Court and other courts have held that although a defendant has been tried and convicted of an offense he may thereafter be brought into court and upon proof of an earlier conviction be sentenced to additional or increased imprisonment. *Graham* v. *West Virginia,* 224 U. S. 616; *State* v. *Zywicki,* 175 Minn. 508.

In the instant case it is manifest that Congress intended the criminal provisions of the National Prohibition Act and the tax or penalty provisions to be cumulative and not alternative. This intention is emphasized by the subsequent enactment of the Willis-Campbell Act specifically continuing in force all nonconflicting revenue statutes. At no place in the Act or the Supplemental Act is it suggested that the Government must elect to sue either for the tax and penalties or proceed criminally. Section 35 of the Act specifically provides that the payment of the taxes and penalties therein provided shall not "relieve anyone from criminal liability." This is an explicit statement of intention.

The following decisions support the contention above advanced: *United States* v. *Mt. Clemens Beverage Co.* (E. D. Mich.), 23 F. (2d) 885; *United States* v. *Bullinger* (E. D. N. Y.), 290 Fed. 395.

The cases relied upon by the respondent in the court below to sustain the contention of double

jeopardy are mostly cases (1) where it was not clear that the statutory penalties were intended to be cumulative (*United States* v. *Gates*, Fed. Cas. No. 15,191; *United States* v. *McKee*, Fed. Cas. No. 15,688), or (2) cases holding that where an issue as to the existence of an act or fact has been tried in a criminal prosecution a judgment of *acquittal* is conclusive in a later suit *in rem*, as a cause for forfeiture of the defendant's property, where as against the defendant the existence of the same act or fact is in issue (*Coffey* v. *United States*, 116 U. S. 436; *United States* v. *Cases of Champagne*, 9 F. (2d) 710). In the case of *Murphy* v. *United States*, 272 U. S. 630, wherein an *acquittal* under Section 21, Title II, of the National Prohibition Act on a charge of maintaining a nuisance was held not to bar a proceeding under Section 22 to abate the nuisance, it was merely held that the rule of the *Coffey case* did not apply where the subsequent proceeding was not intended to impose a penalty upon the defendant.

There is language in *United States* v. *Chouteau*, 102 U. S. 603, 610, which tends to support the contention of the respondent, but the facts of that case show that a compromise was entered into whereby the defendant paid to the Government a certain sum "in full satisfaction * * * of said indictments and prosecutions" which indictments the court found to "constitute the whole ground and

cause of the present action." (P. 610.) In other words, the parties had effected a settlement of the very offense for which the Government sought subsequently to collect the statutory penalty from the defendant's surety. Upon its facts the *Chouteau case* is clearly distinguishable.

III

PARAGRAPH 9, SECTION 701 OF THE REVENUE ACT OF 1924 IS CONSTITUTIONAL

The respondent contended in the court below that the tax imposed by Section 701 upon "Every person carrying on the business of a * * * retail liquor dealer * * * in any State * * * contrary to the laws of such State," was in effect a penalty imposed for violation of State law and therefore repugnant to the Tenth Amendment in that it encroached upon the power reserved to the States to determine the punishment to be imposed for infractions of their laws. We submit that the contention is without merit.

In the first place, the exaction in question is, as the name given it in the statutes implies, a tax. Considered as such, it can not, in view of the decision of this Court in the *License Tax Cases*, 5 Wall. 462, be held to be unconstitutional because imposed in consequence of an act which is a violation of State law. The cases cited involved the validity of indictments for violations of Acts

of Congress prohibiting any person from engaging in the business of selling lottery tickets or of retail dealing in liquor without obtaining a license from the United States and paying a special tax. It was argued on behalf of the defendants that as the sale of lottery tickets and the dealing in liquor were prohibited by State law, the legislation upon which the indictments were based was unconstitutional. In upholding the power of Congress to impose these taxes, this Court said (p. 473):

> There is nothing hostile or contradictory * * * in the acts of Congress to the legislation of the States. What the latter prohibits, the former, if the business is found existing notwithstanding the prohibition, discourages by taxation. The two lines of legislation proceed in the same direction, and tend to the same result. It would be a judicial anomaly, as singular as indefensible, if we should hold a violation of the laws of the State to be a justification for the violation of the laws of the Union.

We furthermore contend that even if regarded as a penalty the "tax" here involved is not open to the constitutional objection urged by the respondent. Prior to the adoption of the Eighteenth Amendment this Court upheld the validity of the Webb-Kenyon Law (Act of March 1, 1913, c. 90, 37 Stat. 699), prohibiting the transportation in interstate commerce into any State of intoxicating liquor for purposes prohibited by the laws of such State (*Clark Distilling Co.* v. *Western Maryland*

Ry. Co., 242 U. S. 311) as well as the validity of the Reed Amendment (Act of March 3, 1917, c. 162, 39 Stat. 1058, 1069), prohibiting such transportation of intoxicating liquor into any State whose laws prohibited the manufacture or sale therein of intoxicating liquor for beverage purposes (*United States* v. *Hill*, 248 U. S. 420). Regarding the power of Congress to regulate interstate commerce, the Court in the case last cited said (p. 425): "Congress may exercise this authority in aid of the policy of the State, if it sees fit to do so."

The power conferred upon Congress by the Eighteenth Amendment to enforce its provisions by appropriate legislation may be exercised throughout the entire territorial limits of the United States and "is in no wise dependent on or affected by action or inaction on the part of the several States of the Union." *National Prohibition Cases*, 253 U. S. 350, 387. In the exercise of that power Congress may adopt any appropriate means to make the prohibition of the traffic in intoxicating liquors effective. *Everard's Breweries* v. *Day*, 265 U. S. 545, 560; *Selzman* v. *United States*, 268 U. S. 466, 468–469.

Since Congress had power to enact the Webb-Kenyon Law and the Reed Amendment in aid of the policies of States, it would seem that it likewise has power, to the same end, to further penalize the sale of liquor in States wherein such sale is prohibited.

CONCLUSION

The case was incorrectly decided below. It involves a question of sufficient general importance to justify a review by this Court. The petition for certiorari should therefore be granted.

Respectfully submitted.

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No. 74

In the Supreme Court of the United States

OCTOBER TERM, 1930

THE UNITED STATES OF AMERICA, PETITIONER

v.

ANTHONY LA FRANCA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES

INDEX

	Page
Opinions below	1
Jurisdiction	1
Questions presented	2
Statutes involved	2
Statement	3
Specification of errors to be urged	5
Summary of argument	5
Argument:	
I. The suit is not barred by section 5 of the Willis-Campbell Act	8
II. There is no double jeopardy	23
III. Paragraph 9, section 701 of the revenue act of 1924 is constitutional	30
Conclusion	33
Appendix	35

CITATIONS

Cases:	
Albrecht v. *United States*, 273 U. S. 1	24
Bailey v. *United States*, 259 Fed. 88	25
Clark Distilling Co. v. *Western Maryland Ry. Co.*, 242 U. S. 311	32
Coffey v. *United States*, 116 U. S. 436	29
Everard's Breweries v. *Day*, 265 U. S. 545	32
Feinberg v. *United States*, 2 F. (2d) 955	23
Graham v. *West Virginia*, 224 U. S. 616	28
Haddad v. *State*, 23 Ariz. 105	26
Hebert v. *Louisiana*, 272 U. S. 312	24
Hepner v. *United States*, 213 U. S. 103	28
Ledbetter v. *United States*, 170 U. S. 606	25
Leszynsky, In re Fed. Cas. 8, 279	26, 27
License Tax Cases, 5 Wall. 462	30–31
Lipke v. *Lederer*, 259 U. S. 557	6, 8, 12, 14
McNutt v. *United States*, 267 Fed. 670	25
Murphy v. *United States*, 272 U. S. 630	15–16, 29
National Prohibition Cases, 253 U. S. 350	32
People v. *Meakim*, 133 N. Y. 214	25, 26
Regal Drug Co. v. *Wardell*, 260 U. S. 386	6, 8, 9, 11
Rosen v. *United States*, 271 Fed. 651	23
Selzman v. *United States*, 268 U. S. 466	32
State v. *Zywicki*, 175 Minn. 508	28
Stout v. *State*, 36 Okla. 744	26

Cases—Continued.

	Page
United States v. *Bullinger*, 290 Fed. 395	29
United States v. *2,180 Cases of Champagne*, 9 F. (2d) 710	29
United States v. *Choteau*, 102 U. S. 603	29–30
United States v. *Gates*, Fed. Ca. 15,191	29
United States v. *Hill*, 248 U. S. 420	32
United States v. *McKee*, Fed. Cas. 15,688	29
United States v. *Mt. Clemens Beverage Co.*, 23 F. (2d) 885	29
United States v. *One Ford Coupe*, 272 U. S. 321	6, 15, 22, 23
United States v. *Stafoff*, 260 U. S. 477	22
United States v. *Three Copper Stills*, 47 Fed. 495	27
United States v. *Trobe*, Fed. Cas. 16, 541	27
United States v. *Yuginovich*, 256 U. S. 450	19, 20, 22
Vamvas v. *United States*, 13 F. (2d) 347	24
Statutes:	
Act of February 24, 1919, c. 18, 40 Stat. 1057, sec. 600 (a)	16
National prohibition act, c. 85, 41 Stat. 305, Title II, sec. 35 (U. S. C., title 27, sec. 52)	18, 35
Reed Amendment (act of Mar. 3, 1917, c. 162, 39 Stat. 1058)	32
Revenue act of 1924, c. 234, 43 Stat. 253, sec. 701, par. 9 (U. S. C., title 26, sec. 206)	10, 30, 36–37
Revised statutes—	
Secs. 563 (3), 919 (U. S. C., title 28, secs. 41 (9), 732)	28
Sec. 3176, as amended	9
Secs. 3213–3216 (U. S. C., title 26, secs. 142–145)	28
Webb-Kenyon law (act of Mar. 1, 1913, c. 90, 37 Stat. 699)	32
Willis-Campbell Act, c. 134, 42 Stat. 222, sec. 5 (U. S. C., title 27, sec. 3)	8, 20, 27, 36
Miscellaneous:	
Bishop on Criminal Law, 9th Ed., Vol. 1, sec. 990 (2)	26
House Rept. No. 224, 67th Cong., 1st sess., p. 3	20, 21
Senate Rept. No. 151, 66th Cong., 1st sess., p. 18	18

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OPINIONS BELOW

The opinion of the District Court (R. 7) is reported in 26 F. (2d) 706, and that of the Circuit Court of Appeals (R. 28) in 37 F. (2d) 269.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered January 7, 1930. (R. 30.) The petition for certiorari was filed April 7, 1930, and was granted May 5, 1930. (R. 30.) Jurisdiction to issue the writ is conferred by Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether a suit at law to recover from the respondent—

(*a*) A special tax on retail liquor dealers provided by Section 3244 R. S., doubled by Section 35, Title II, of the National Prohibition Act ($37.50);

(*b*) A special tax provided by Section 701 of the Revenue Act of 1924 for engaging in the business of a retail liquor dealer in Louisiana contrary to the law of that State, doubled by Section 35, Title II, of the National Prohibition Act ($1,500);

(*c*) A penalty ($4.68) provided by Section 3176 R. S., as amended, for failure to file a return as a retail liquor dealer, and

(*d*) A penalty ($500) provided by Section 35, Title II, of the National Prohibition Act for retail dealers selling intoxicating liquor in violation of that Act—

assessed against the respondent, who had been convicted and fined under the National Prohibition Act for unlawfully selling liquor, is barred by Sec. 5 of the Willis-Campbell Act.

2. Whether such suit placed the respondent in double jeopardy in violation of the Fifth Amendment.

3. Whether paragraph 9 of Section 701 of the Revenue Act of 1924 is constitutional.

STATUTES INVOLVED

These are set forth in an appendix to this brief, pp. 35–37, *infra*.

STATEMENT

A suit at law was instituted November 9, 1927, by the United States in the District Court to recover from the respondent $2,042.18 in taxes and penalties. The petition alleged in substance that the defendant on specified dates within the period from October 10, 1924, to April 25, 1925, sold intoxicating liquor in a certain restaurant of which he was proprietor to persons named; that by reason of such sales he had become a retail liquor dealer subject to the following taxes for the nine months ending June 30, 1925:

> (1) Retail liquor dealer's tax, imposed by Section 3244, Revised Statutes, doubled under Section 35, Title II, of the National Prohibition Act, $37.50.
>
> (2) A penalty, imposed by Section 3176, Revised Statutes, as amended, for failure to make and file a return on October 10, 1924, $4.68.
>
> (3) A special tax imposed by Section 701 of the Revenue Act of 1924 for engaging in the business of a retail liquor dealer in the State of Louisiana contrary to the law of that State, doubled under said Section 35, $1,500.[1]

---

[1] The tax imposed by Section 701 of the Revenue Act of 1924 (pp. 36–37, *infra*) for engaging in the business of a retail liquor dealer in violation of local law is $1,000. In the instant case the tax was assessed for nine months, or three-fourths of a year, and amounted to $750. This amount was doubled under Section 35, Title II, of the National Prohibition Act.

(4) A penalty imposed by Section 35 upon retail dealers selling intoxicating liquor in violation of the National Prohibition Act, $500.

The petition further averred that in case No. 10124 on the docket of that court the defendant had on April 28, 1926, pleaded guilty to and had been convicted of selling intoxicating liquor. (R. 1–5.)

By plea of former jeopardy, general demurrer, and plea of *res adjudicata,* the defendant sought to have the suit dismissed on the grounds: (1) That the charges upon which he had been convicted in case No. 10124, were identical with and provable by the same evidence as were the charges upon which the taxes and penalties were sought to be recovered, and (2) that the action was barred by Section 5 of the Willis-Campbell Act. (R. 5, 10–11.) These pleas were overruled (R. 7, 11), the trial court holding that the present action was not a criminal prosecution so as to bring it within the bar of the Fifth Amendment or within Section 5 of the Willis-Campbell Act (R. 7–10). Thereafter an answer and supplemental answer were filed alleging that Paragraph 9 of Section 701 of the Revenue Act of 1924 was unconstitutional in that it imposed a penalty for violation of State law. (R. 12–13.) A jury was waived and a stipulation of facts filed (R. 14–19) substantially the same as those alleged in the petition (R. 15). Judgment was entered in favor of the United States for the full sum of the

taxes and penalties (R. 23), and a motion for a new trial denied (R. 22–23).

Upon appeal the judgment was reversed by the Circuit Court of Appeals upon the ground that the suit was barred by Section 5 of the Willis-Campbell Act. (R. 28–30.) This Court thereafter granted a writ of certiorari. (R. 30.)

SPECIFICATION OF ERRORS TO BE URGED

1. The Circuit Court of Appeals erred in reversing the judgment of the District Court.

2. The Circuit Court of Appeals erred in holding that the present action is barred by Section 5 of the Willis-Campbell Act.

SUMMARY OF ARGUMENT

The provision of Section 5 of the Willis-Campbell Act, held by the court below to bar the present suit, applies only where the act in question is a "violation" *both* (1) of the National Prohibition Act or Supplemental Act and (2) of the prior internal revenue laws, and is effective as a bar only against a "prosecution" for such "act or offense" under one of such laws after there has been a conviction therefor under the other.

The Government contends that none of the items in suit were within the bar of the Willis-Campbell Act. Some of the items can not be regarded as penalties. Others, if so regarded, did not arise from an act or acts for which the respondent was previously convicted, and others were not incurred for any "violation" of a "law in force when the

National Prohibition Act was enacted" within the meaning of the Willis-Campbell Act.

If the items in question are not to be regarded as penalties, the Government's right to recover is plain. If they are to be regarded as penalties the decisions of this Court in *Lipke* v. *Lederer,* 259 U. S. 557, and *Regal Drug Co.* v. *Wardell,* 260 U. S. 386, are not controlling, because there was no attempt to distrain for the collection of these items as in the cited cases. This was a plenary suit, in which the Government was clearly entitled to recover the penalties unless recovery was barred by Section 5 of the Willis-Campbell Act or on grounds of double jeopardy.

The intent of Congress that the liquor taxes imposed by the internal revenue laws should be collected from persons illegally, as well as those legally, dealing in liquor, and that the collection of taxes on illegal dealings in liquor should not be inhibited because of the enforcement of any criminal liability arising from those dealings, is clearly evidenced by provisions in Section 35 of the National Prohibition Act, by Section 5 of the Willis-Campbell Act, by the report of the Senate Judiciary Committee dealing with the section of the bill which became Section 35 of the National Prohibition Act, by the report of the House Judiciary Committee on the bill which became the Willis-Campbell Act, and by decisions of this Court. *United States* v. *One Ford Coupe,* 272 U. S. 321.

Assuming that the question is before this Court, the respondent's contention that he was subjected to double jeopardy is untenable. His prior conviction was for selling liquor in violation of the National Prohibition Act, whereas the instant suit, if regarded as a prosecution for an offense, was a prosecution for a different offense, that is, for conducting business as a retail liquor dealer.

Moreover, where, as in the instant case, the Legislature clearly provides that the doing of a certain act shall be subjected both to a penalty and to a criminal prosecution, a suit for the penalty may be maintained after the offender has been prosecuted and convicted of the offense for which the penalty is sought to be collected.

Paragraph 9, Section 701 of the Revenue Act of 1924, imposing a tax upon "Every person carrying on the business of a * * * retail liquor dealer * * * in any State * * * contrary to the laws of such State," is not repugnant to the Tenth Amendment of the Constitution, in that it encroached upon the power reserved to the States to determine what punishment should be imposed for infractions of their laws. The exaction in question is, as the name given it in the statute implies, a tax. That Congress may tax businesses which are prohibited by State law is clear.

But, even if regarded as a penalty, the "tax" imposed by Section 701 is not open to the constitutional objection urged by the respondent. Prior to the adoption of the Eighteenth Amendment, the

validity of the Webb-Kenyon Law, which penalized the introduction of liquor into any State for purposes prohibited by the laws of such State, was upheld by this Court, as was the Reed Amendment, prohibiting the transportation of liquor into any State whose laws prohibited the manufacture or sale therein of liquor for beverage purposes.

ARGUMENT

I

THE SUIT IS NOT BARRED BY SECTION 5 OF THE WILLIS-CAMPBELL ACT

The provision of Section 5 involved is:

> * * * but if any act is a violation of any of such laws [that is, "laws that were in force when the National Prohibition Act was enacted"] and also of the National Prohibition Act or of this Act, a conviction for such act or offense under one shall be a bar to prosecution therefor under the other.

Under its plain terms the foregoing provision applies only where the same act is a "violation" both of the National Prohibition Act or Supplemental Act and of such antecedent laws, and the bar is against a "prosecution" for "such act or offense" under one of such laws after there has been a conviction therefor under the other.

The court below held this case within the bar of Section 5 by the following reasoning: (1) The amounts sought to be recovered are penalties or fines for criminal misconduct, citing *Lipke* v. *Lederer*, 259 U. S. 557; *Regal Drug Co.* v. *Wardell*, 260 U. S.

386; (2) a civil suit for the recovery of such penalties is a "prosecution" for an offense; and (3) since the penalties sued for arose from acts (*a*) which were violations of *both* the National Prohibition Act and the prior internal revenue laws, and (*b*) of which the respondent had been convicted under the National Prohibition Act, the present suit was a "prosecution" which was barred by Section 5 of the Willis-Campbell Act.

The Government contends:

(1) The *reasoning* of the court below can have no application to the items involved in this suit.

(2) The basic tax imposed upon retail liquor dealers by Section 3244 of the Revised Statutes is not a "penalty."

(3) Assuming that the items here involved are "penalties" the legislative intent is clear that they should be collected regardless of a prior criminal conviction for the acts upon which the penalties are based.

The reasoning of the Court below has no application to the items involved in this suit.

1. The item of $4.68, referred to as a "penalty" in the petition, was assessed under Section 3176 of the Revised Statutes, as amended (Act of June 2, 1924, c. 234, 43 Stat. 253, 339–340), which provides that in the event of a failure to file a tax return within the time prescribed by law the Commissioner of Internal Revenue "shall add to the tax 25 per centum of its amount." Clearly the respondent's failure to file a return was not involved in his

prior conviction, and if the present suit is a "prosecution" for the act in question it is a prosecution for an act for which there has been no prior conviction.

2. The penalty of $500, sought to be recovered because of the respondent's having illegally sold liquor as a retail dealer, was imposed by Section 35 of the National Prohibition Act. As the respondent's prior conviction was under *this same Act*, it is obvious that a suit to recover that penalty does not come within the bar of Section 5.

3. Liability for the *additional amounts resulting from the doubling,* under Section 35 of the National Prohibition Act, of the retail liquor dealer's taxes imposed by Section 3244 of the Revised Statutes and Section 701 of the Revenue Act of 1924 arose solely under *the National Prohibition Act*—the same Act under which the respondent had been previously convicted. The bar of Section 5 accordingly could not apply to a suit for the recovery of these additional amounts.

4. The *basic* retail liquor dealers' tax of $18.75 (See item (1), p. 3 *supra*) was imposed under Section 3244 of the Revised Statutes. Section 3244 is not a criminal statute and does not purport to make unlawful the engaging in business as a retail liquor dealer. Obviously the respondent did not "violate" that statute. Section 5 of Willis-Campbell Act only applies where the same act is a "violation" of both the National Prohibition Act and the prior revenue laws.

5. The tax imposed under Section 701 of the Revenue Act of *1924* for carrying on the business of a retail liquor dealer in Louisiana contrary to the law of that State did not arise from an act which was a violation of a law "in force when the National Prohibition Act was enacted."

While the foregoing may suffice to dispose of the entire case so far as Section 5 of the Willis-Campbell Act is concerned, we feel warranted in discussing in more detail the taxes imposed under Section 3244 R. S. and Section 701 of the Revenue Act of 1924.

The court below held that all the items involved were penalties upon authority of *Lipke* v. *Lederer* and *Regal Drug Co.* v. *Wardell, supra.*

Lipke v. *Lederer* was a suit to enjoin a threatened collection by distraint, upon an assessment made without notice or opportunity to be heard, of an additional or "double tax" of $45.83, and penalty of $500, under Section 35 of the National Prohibition Act, and of a so-called "penalty" under Section 3244 of the Revised Statutes. The assessment was based upon alleged sales of liquor by Lipke in violation of the National Prohibition Act. This Court held that as Lipke's liability was predicated upon acts which were violations of law, the monetary exactions in question were penalties, as distinguished from taxes, and therefore could not be collected in the summary way attempted. It said (pp. 561–562):

> When by its very nature the imposition is a penalty, it must be so regarded. *Helwig* v. *United States*, 188 U. S. 605, 613. Evidence of crime (§29) is essential to assessment under §35. It lacks all the ordinary characteristics of a tax, whose primary function "is to provide for the support of the government" and clearly involves the idea of punishment for infraction of the law—the definite function of a penalty. *O'Sullivan* v. *Felix*, 233 U. S. 318, 324.
>
> * * * we can not conclude, in the absence of language admitting of no other construction, that Congress intended that penalties for crime should be enforced through the secret findings and summary action of executive officers.

In *Regal Drug Co.* v. *Wardell* a similar suit was brought to enjoin the collection by distraint of (a) "taxes" upon distilled spirits and wines and for conducting the business of a rectifier, (b) a penalty of $500 under Section 35 of the National Prohibition Act for illegally selling liquor as a retail dealer, and (c) a penalty of $1,000 under the same statute for illegally manufacturing liquor, all of which "taxes" and "penalties," totaling $75,592.61, were assessed without notice or opportunity to be heard given the Drug Company. While conceding in this Court that, in view of *Lipke* v. *Lederer*, the *penalties* and *double taxes* which had been assessed under Section 35 of the National Prohibition Act could not be collected by summary procedure, the Government contended that there was nothing in that

decision to prevent the summary collection of *taxes* imposed by the internal revenue laws antedating the National Prohibition Act. This Court, however, held the case governed by *Lipke* v. *Lederer*.

At the time of withdrawing the distilled spirits and wines in question the Regal Drug Company paid all taxes due thereon under the revenue laws antedating the National Prohibition Act. The additional "taxes" sought to be collected were assessed upon the theory that the spirits and wines had been disposed of by the Drug Company for beverage purposes. These additional taxes were: (1) A so-called "differential tax" of $4.20 per gallon imposed by Section 600 (a) of the Revenue Act of 1918 (i. e., the difference between the tax of $2.20 per gallon theretofore paid by the Drug Company and the tax of $6.40 per gallon imposed by Section 600 (a) upon spirits withdrawn for beverage purposes); (2) a tax of forty cents per gallon on the sweet wines; (3) a tax of sixteen cents per gallon on the still wines, and (4) a tax of $93.75 "for having conducted the business of a rectifier in violation of the law." (Case No. 108, Oct. Term, 1922, R. 8.)

Liability for the tax of $4.20 upon the distilled spirits could arise *under the Revenue Act of 1918* only from an act which was a violation of law. The taxes assessed upon the wines, being at the same rate per gallon as the taxes thereon which had already been paid by the Drug Company, were obviously the additional amounts resulting from the

doubling of such taxes under Section 35 of the National Prohibition Act. Both the distilled-spirits tax and the wine taxes came, therefore, within the plain effect of the decision in *Lipke* v. *Lederer*. The so-called "penalty" of $93.75 was described in the Government's brief filed in this Court as—

> a tax of $75 * * * for conducting the business of a rectifier for three-fourths of a year (under Rev. Stat., sec. 3244, as amended by the act of Mar. 1, 1879, sec. 4, 20 Stat. 327, 333), plus 25 per cent for failure to make a return (under Rev. Stat., sec. 3176, as amended by the act of Feb. 24, 1919, 40 Stat. 1057, 1148), amounting altogether to $93.75.

The rectifier's tax assessed against the Regal Drug Co. was imposed by Section 3244 of the Revised Statutes upon "Every person who rectifies * * *." Although that statute made no distinction between lawful and unlawful rectification, the item of $93.75 assessed thereunder against the Drug Company was apparently regarded by this Court, like all the other items involved in that case, as a penalty. It is therefore true that in *Regal Drug Co.* v. *Wardell* an exaction which would unquestionably be a tax if liability therefor had been incurred by reason of a lawful act but which in fact arose from an act which was a violation of laws was not distinguished from other exactions of a penal character.

But in the later case of *United States* v. *One Ford Coupe*, 272 U. S. 321, this distinction was made clear. This Court there said (p. 328):

> *A tax on intoxicating liquor does not cease to be such because the sovereign has declared that none shall be manufactured, and because the main purpose in retaining the tax is to make lawbreaking less profitable.* What was sought to be enforced and held to be a penalty in *Lipke* v. *Lederer*, 259 U. S. 557, 561, was the so-called double tax. Here, we are dealing with the basic production tax.
>
> With respect to the character of the impositions called taxes there is nothing in either the Revenue Acts or the Prohibition Act which makes any distinction between the product of legal and illegal distillation. *The Acts left in effect the basic tax of $2.20 per gallon, which was and is a true tax on the product, whether legally or illegally distilled,* and added to it the additional amounts in case of illegal distillation or diversion to illegal uses. These additional amounts also are called taxes by Congress, and were understood by it to be such. Whether they were intrinsically penalties and should be treated as such we need not determine. *The basic tax of $2.20 a gallon on liquor illegally produced is not imposed because of illegality, but despite of it.* (Italics ours.)

Thereafter, in *Murphy* v. *United States*, 272 U. S. 630, this Court said (p. 632):

> *The mere fact that it [a tax] is imposed in consequence of a crime is not conclusive. A government may endeavor to prevent certain facts and yet provide that if they happen they shall yield as much revenue as they might have yielded if lawful. United States* v. *One Ford Coupe Automobile, ante,* p. 321. (Italics ours.)

Liability for the tax imposed upon retail-liquor dealers by Section 3244 of the Revised Statutes, the doubled amount of which was sued for in this case, is not by that statute made to depend upon the doing of an act which is a violation of law. That tax can not be distinguished in principle, therefore, from the basic production tax of $2.20 per gallon imposed by Section 600 (a) of the Revenue Act of 1918 which was held in *United States* v. *One Ford Coupe, supra,* to be a true tax. Being a tax, as distinguished from a penalty, a suit for its recovery is obviously not a "prosecution" for an "offense" within the bar of Section 5 of the Willis-Campbell Act.

Although the item of $1,500[2] involved (p. 3, *supra*) was imposed, as to $750 thereof, under Section 701 of the Revenue Act of 1924, that section was in lieu of a similar section in the Revenue Act of 1921, which in turn was in lieu of a similar provision in the Revenue Act of 1918. Accordingly the

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[2] The amount assessed under Section 701 of the Revenue Act of 1924 was only $750. This sum was held to be doubled under Section 35, Title II, of the National Prohibition Act. See footnote 1, p. 3, *supra.*

Court may consider that this item was imposed under a revenue law in force prior to the National Prohibition Act. Moreover, the liability for the "tax" imposed by Section 701 of the Revenue Act of 1924 upon "Every person carrying on the business of a * * * retail liquor dealer * * * in any State * * * contrary to the laws of such State" can arise under that statute only in the event of a violation of law. If this be assumed to be sufficient, notwithstanding what this Court said the *One Ford Coupe* and *Murphy cases, supra,* to transform that "tax" into a penalty, we nevertheless submit that its recovery in this suit was justified.

It is clear, in the first place, that the constitutional grounds upon which the *Lipke* and *Regal Drug Co. cases* were decided have no application in this case, for recovery here was sought not by distraint upon an assessment made without notice or opportunity to be heard, as in those cases, but by a plenary suit in which the respondent was fully accorded, and availed himself of, the opportunity to appear and defend. The right of the Government to recover penalties in such a proceeding can not be doubted.

It is also clear, we submit, that Congress intended that the liquor taxes imposed by the internal revenue laws should be collected from persons illegally, as well as those legally, dealing in liquor, and that Congress did not intend by Section 5 of the Willis-Campbell Act to prevent the collection of taxes

imposed upon illegal dealings in liquor because of the enforcement of any criminal liability arising out of the same dealings. This appears from the following considerations:

Section 35, Title II, of the National Prohibition Act, declares:

> This Act shall not relieve anyone from paying any taxes or other charges imposed upon the manufacture or traffic in such liquor. * * * nor shall this Act relieve any person from any liability, civil or criminal, heretofore or hereafter incurred under existing laws.

The report of the Senate Judiciary Committee to accompany H. R. 6810, which became the National Prohibition Act, clearly indicates the purpose of Congress that the internal-revenue liquor taxes should apply to the traffic in illicit liquor.[3]

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[3] Senate Report No. 151, 66th Congress, 1st Session, p. 18, contained the following statement with reference to Section 36 of H. R. 6810, which later became Section 35, Title II, of the National Prohibition Act:

"TAX ON LIQUOR ILLEGALLY MANUFACTURED AND SOLD

"Section 36 provides for a tax upon liquors illegally manufactured and sold. This provision prevents the illicit liquor dealers from paying the tax, when they sell in violation of law, and at the same time is a very effective weapon for law enforcement.

"The suggestion that it is inconsistent to collect tax from an outlawed traffic is answered by the courts, which hold that a prohibitive tax is even more effective to secure the suppression of an outlawed traffic than the criminal laws.

"The rule of the court applying to the collection of these taxes on an outlawed traffic is stated in *License Tax Cases* (5 Wall., 462–475):

In *United States* v. *Yuginovich,* 256 U. S. 450, this Court recognized that the provisions of the internal revenue laws imposing taxes upon the manufacture and sale of intoxicating liquor had remained in force notwithstanding the National Prohibition Act and applied as well to liquor manufactured in violation of that Act as to liquor lawfully produced. Although holding in that case that Section 3257 of the Revised Statutes, which makes it an offense to defraud the United States of the tax on spirits distilled by one carrying on the business of a distiller, had been impliedly repealed by the National Prohibition Act because inconsistent therewith, the Court nevertheless observed (p. 462):

> That Congress may under the broad authority of the taxing power tax intoxicating liquors notwithstanding their production is

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"'There is nothing hostile or contradictory, therefore, in the acts of Congress to the legislation of the States. What the latter prohibits, the former, if the business is found existing notwithstanding the prohibition, discourages by taxation. The two lines of legislation proceed in the same direction and tend to the same result.'

"In *Foster* v. *Speed* (120 Tenn. 470) the court said:

"'A business which is prohibited may be taxed. The imposition of the tax upon an outlawed business is often more efficient in supppressing it than statutes making it a criminal offense.'

"Judge Cooley, in his work on taxation (3 ed., 242), said:

"'On the other hand one purpose of taxation sometimes is to discourage the business and perhaps put it out of existence.'

"See also *Lyle* v. *Sears* (65 O. S. 49); *Burrel* v. *Holtz* (84 O. S. 4, 974)."

> prohibited and punished, we have no question.

And again (p. 464):

> *We agree with the court below that while Congress manifested an intention to tax liquors illegally as well as those legally produced,* which was within its constitutional power, it did not intend to preserve the old penalties prescribed in Section 3257 in addition to the specific provision for punishment made in the Volstead Act. (Italics ours.)

The Willis-Campbell Act, which was passed at the session of Congress next following the decision of the *Yuginovich case,* contains in Section 5 the following provision:

> That all laws in regard to the * * * taxation of * * * intoxicating liquor * * * that were in force when the National Prohibition Act was enacted shall be and continue in force * * *.

Furthermore, the report of the House Judiciary Committee on H. R. 7294, 67th Congress,[4] which

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[4] In H. Rep. No. 224, 67th Cong., 1st Sess., to accompany H. R. 7294, it was said (p. 3):

"Section 5 has been added to this bill as an amendment to meet a situation created by a decision of the Supreme Court, dated June 1, 1921, in which that court in effect held that the revenue laws applicable to the manufacture, taxation, and traffic in intoxicating liquor for beverage purposes are no longer in force. In the years past it has been deemed necessary to maintain the strictest kind of control over all kinds of liquor to prevent it from being made and sold without the payment of taxes, and there is if anything a greater

became the Willis-Campbell Act, shows beyond all question that Section 5 was designed to *insure,* rather than to curtail, the collection of taxes upon *illegal,* as well as legal, dealings in liquor, and that the liability for payment of taxes upon illegal dealings in liquor should exist independently of, and in

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necessity for such control at this time. There is no practical way of distinguishing between beverage and nonbeverage liquor, and there certainly can be no good reason why the man who makes liquor in violation of law should be dealt with more leniently than the man who makes it for lawful purposes. During the last year the Government collected more than $138,000,000 in revenue from liquor, and there is every reason to believe that the present rate of taxation will be maintained if it is not increased in the next revenue law.

"This section is important for another reason. Section 35 of Title II of the national prohibition act provides for an additional tax on the illegal manufacture and traffic in liquor over that imposed on liquor lawfully produced and sold. This tax was held to be valid in this decision of the Supreme Court, but decisions have been rendered by various district courts that would indicate that there is no effective remedy for its enforcement. A failure to make suitable provision for the enforcement of these taxes and penalties may mean a loss to the Government of many millions of dollars. There will no doubt be more than $50,000,000 of such taxes assessed before the end of the next fiscal year. The imposition of this tax is one of the most effective remedies against the law violators.

* * * * *

"There has been very little opposition to any of the provisions of this bill, and section 5 is simply seeking to reenact what was believed to be the law at the time the national prohibition act was passed. That act provides, Section 35, Title II, that it shall be construed as an addition to existing laws and that it shall not relieve any person from any liability, civil or criminal, heretofore or hereafter incurred under existing laws."

addition to, any criminal liability arising out of those dealings.

Following the passage of the Willis-Campbell Act this Court decided, in *United States* v. *Stafoff*, 260 U. S. 477, that the new Act had the effect of reenacting the internal revenue laws held to have been impliedly repealed in the *Yuginovich case*. In that case this Court said (p. 480): "Of course Congress may tax what it also forbids. 256 U. S. 462."

In *United States* v. *One Ford Coupe, supra*, this Court again recognized the purpose of Congress that those unlawfully dealing in liquor should not be exempt from the payment of the liquor taxes imposed by the internal revenue laws. It said (272 U. S. 326-327):

> That Congress in enacting that law [National Prohibition Act] would intentionally have exempted illict liquor from taxation is not likely. Moreover, we are not dealing with the construction of the law as enacted in 1919. The Willis-Campbell Act, November 23, 1921, c. 134, § 5, 42 Stat. 222, 223, supplemental thereto, continued in force or reenacted, by express provision, all laws in regard to the taxation of intoxicating liquor not directly in conflict with the prohibitory legislation. Furthermore, the Revenue Act of 1921, November 23, 1921, c. 136, § 600, 42 Stat. 227, 285, enacted on the same day, shows that Congress had no intention then of relieving liquor from taxation merely because

> illegally dealt with. For it provided specifically that if distilled spirits, tax-paid for nonbeverage purposes, be diverted to beverage purposes, an additional tax of $4.20 per gallon must be paid, although under the law such diversion could not be made legally.

In the light of the statutes and decisions of this Court referred to we submit that it could not have been the intention of Congress in enacting Section 5 of the Willis-Campbell Act that the collection under the internal revenue laws of a tax upon the manufacture or sale of illicitly made liquor should bar a prosecution for such manufacture or sale under the National Prohibition Act, or *vice versa,* and that the Circuit Court of Appeals erred in holding the present action barred by Section 5.

II

THERE IS NO DOUBLE JEOPARDY [5]

Although the respondent assigned as error (R. 24) the overruling of his plea of double jeopardy, he failed at the time to except to that action by the court (R. 7). It would seem, therefore, that this contention is not now available to the respondent. *Rosen* v. *United States,* 271 Fed. 651, 653 (C. C. A. 2d); *Feinberg* v. *United States,* 2 F. (2d) 955, 956–957 (C. C. A. 8th).

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[5] Although the court below based its decision solely on its construction of Section 5 of the Willis-Campbell Act, other questions presented by the asignment of errors are discussed in points II and III.

Considering the question on the merits, we submit that the petitioner's contention of double jeopardy can not be sustained unless it is established: (1) that the items sued for are penalties for an "offense," (2) that the present suit is a proceeding to punish the respondent for this offense, (3) that the respondent has been convicted of this *same* offense, and (4) that it is beyond the power of Congress to provide that the respondent may be subjected *both* to a penalty, recoverable in a civil proceeding, and a criminal prosecution, for the same offense.

The only "offense" involved in the instant suit is that of unlawfully engaging in business as a retail liquor dealer. The Government contends, first, that this was not the offense of which the respondent was convicted. A single transaction may be the basis for several offenses. *Hebert* v. *Louisiana,* 272 U. S. 312. Thus, a conviction for the unlawful sale of liquor will not bar a subsequent prosecution for the unlawful possession of the same liquor. *Albrecht* v. *United States,* 273 U. S. 1. Similarly, a conviction for the sale of cocaine without the vendor being registered will not bar a subsequent prosecution for the sale of the same cocaine without a written order. *Yumvas* v. *United States,* 13 F. (2d) 347 (C. C. A. 5th). In the instant case the Government was required to establish not merely the unlawful sale of liquor—which alone was necessary for the prior convic-

tion (R. 3, 12)—but also that the respondent was a "retail liquor dealer." The evidence required to establish these two offenses is materially different. *Ledbetter* v. *United States*, 170 U. S. 606, 610; *Bailey* v. *United States*, 259 Fed. 88, 90 (C. C. A. 6th); *McNutt* v. *United States*, 267 Fed. 670, 674–675 (C. C. A. 8th).

We have already argued (*supra*, pp. 8–23) that Section 5 of the Willis-Campbell Act does not bar recovery of any of the items involved in this suit. Aside from that statute there can be no legal objection to the punishment of a single offense by the imposition of a penalty and by conviction followed by fine and imprisonment, and where it is clear that the penalty is intended to be in addition to the criminal prosecution a suit for the recovery of the penalty is not barred by a prior conviction of the defendant of the same offense for which the penalty is alleged to be due. The penalty is merely part of the punishment imposed, and it is immaterial that its recovery is sought in a separate action.

The Court of Appeals of New York in *People* v. *Meakim*, 133 N. Y. 214, quoted the statement of the rule in an earlier case as follows (p. 224):

> It is undoubtedly competent for the legislature to subject any particular offense both to a penalty and a criminal prosecution. It is not punishing the same offense twice. They are but parts of one punishment. They both constitute the punishment which the

> law inflicts upon the offense. That they are enforced in different modes of proceeding, and at different times, does not affect the principle. It might as well be contended that a man was punished twice when he was both fined and imprisoned, which he may be in most misdemeanors.

See *Stout* v. *State*, 36 Okla. 744; *Haddad* v. *State*, 23 Ariz. 105. See also Bishop on Criminal Law (9th Ed.), Vol. 1, Sec. 990 (2).

The same conclusion is reached by the Federal courts. The case of *In re Leszynsky*, Fed. Cas. No. 8,279 (C. C. S. D. N. Y.), involved Section 3318, Revised Statutes, which imposed a penalty of $100, as well as a fine and imprisonment, for failure to keep a record of spirits distilled. In holding that a criminal action against the defendant was not barred by a prior civil suit to collect the statutory penalty, Judge Blatchford said (p. 399):

> But, in the eye of the law, the three punishments are only one punishment for the same offence, although the penalty of $100 may be recovered in a civil action, and the fine and imprisonment are inflicted by a criminal prosecution. The statute book has many like provisions for punishment of offences, where a penalty to be recovered by a civil action is given, and a fine and imprisonment, or one of them, on a criminal conviction, is prescribed in addition and cumulatively, by the use of the word "and." Provisions for punishment by the forfeiture of

> property, which must be enforced in a civil action, and, cumulatively and in addition, by fine and imprisonment, or one of them, on a criminal conviction of the same offence for which the forfeiture of property is prescribed, are of the same character. * * * Penalties and forfeitures given by statute are to be enforced by civil suits. Rev. St. sec. 563, subd. 3; Id. sec. 919. Fine and imprisonment are to be inflicted as the result of a conviction on a criminal prosecution. Different methods are to be resorted to to enforce the different parts of what is one and the same punishment. But, the fact that the two methods may be progressing simultaneously and one be completed before the other, or that one may be fully completed before the other is commenced, can not have the effect to annul the provision of law in regard to the uncompleted part. * * *

See also *United States* v. *Three Copper Stills*, 47 Fed. 495; *United States* v. *Trobe*, Fed. Cas. 16,541.

Section 5 of the Willis-Campbell Act provides:

> All taxes and tax penalties provided for in section 35 of Title II of the National Prohibition Act shall be assessed and collected in the same manner and by the same procedure as other taxes on the manufacture of or traffic in liquor.

Assuming that the taxes and penalties provided by Section 35 are not properly taxes, but penalties or fines for criminal misconduct, nevertheless it

seems that the ordinary method of collecting such penalties is by a separate civil suit. R. S., Sections 3213–3216 (U. S. C., Title 26, Sections 142–145); R. S., Sections 563 (3), 919 (U. S. C., Title 28, Sections 41 (9), 732). See *Hepner* v. *United States,* 213 U. S. 103. There is no requirement in the double jeopardy provision of the Fifth Amendment that the entire punishment meted out to a defendant for the commission of an offense be determined in one judicial proceeding. This Court and other courts have held that although a defendant has been tried and convicted of an offense he may thereafter be brought into court and upon proof of an earlier conviction be sentenced to additional or increased imprisonment. *Graham* v. *West Virginia,* 224 U. S. 616; *State* v. *Zywicki,* 175 Minn. 508.

In the instant case it is manifest from the discussion under Point I that Congress intended the criminal provisions of the National Prohibition Act and the tax or penalty provisions to be cumulative and not alternative. This intention is emphasized by the subsequent enactment of the Willis-Campbell Act, specifically continuing in force all nonconflicting revenue statutes. At no place in the Act or the Supplemental Act is it suggested that the Government must elect to sue either for the tax and penalties or proceed criminally. Section 35 of the Act specifically provides that the payment of the taxes and penalties therein provided shall not "re-

lieve anyone from criminal liability." This is an explicit statement of intention.

The following decisions support the contention above advanced: *United States* v. *Mt. Clemens Beverage Co.*, 23 F. (2d) 885 (E. D. Mich.); *United States* v. *Bullinger*, 290 Fed. 395 (E. D. N. Y.).

The cases relied upon by the respondent in the court below to sustain the contention of double jeopardy are mostly cases (1) where it was not clear that the statutory penalties were intended to be cumulative (*United States* v. *Gates*, Fed. Cas. 15,191 (S. D. N. Y.); *United States* v. *McKee*, Fed. Cas. 15,688 (C. C. E. D. Mo.)), or (2) cases holding that where an issue as to the existence of an act or fact has been tried in a criminal prosecution a judgment of *acquittal* is conclusive in a later suit *in rem*, for forfeiture of the defendant's property, where as against the defendant the existence of the same act or fact is in issue (*Coffey* v. *United States*, 116 U. S. 436; *United States* v. *2,180 Cases of Champagne*, 9 F. (2d) 710). In the case of *Murphy* v. *United States*, 272 U. S. 630, wherein an *acquittal* under Section 21, Title II, of the National Prohibition Act on a charge of maintaining a nuisance was held not to bar a proceeding under Section 22 to abate the nuisance, it was merely held that the rule of the *Coffey case* did not apply where the subsequent proceeding was not intended to impose a penalty upon the defendant.

There is language in *United States* v. *Chouteau*, 102 U. S. 603, 610, which tends to support the con-

tention of the respondent, but the facts of that case show that a compromise was entered into whereby the defendant paid to the Government a certain sum "in full satisfaction * * * of said indictments and prosecutions," which indictments the court found to "constitute the whole ground and cause of the present action." (P. 610.) In other words, the parties had effected a settlement of the very offense for which the Government sought subsequently to collect the statutory penalty from the defendant's surety. Upon its facts the *Chouteau case* is clearly distinguishable.

III

PARAGRAPH 9, SECTION 701 OF THE REVENUE ACT OF 1924 IS CONSTITUTIONAL

The respondent contended in the court below that the tax imposed by Section 701 upon "Every person carrying on the business of a * * * retail liquor dealer * * * in any State * * * contrary to the laws of such State" was in effect a penalty imposed for violation of State law and therefore repugnant to the Tenth Amendment in that it encroached upon the power reserved to the States to determine the punishment to be imposed for infractions of their laws. We submit that the contention is without merit.

In the first place, the exaction in question is, as the name given it in the statute implies, a tax. Considered as such, it can not, in view of the decision of this Court in the *License Tax Cases,* 5

Wall. 462, be held to be unconstitutional because imposed in consequence of an act which is a violation of State law. The cases cited involved the validity of indictments for violations of Acts of Congress prohibiting any person from engaging in the business of selling lottery tickets or of retail dealing in liquor without obtaining a license from the United States and paying a special tax. It was argued on behalf of the defendants that as the sale of lottery tickets and the dealing in liquor were prohibited by State law, the legislation upon which the indictments were based was unconstitutional. In upholding the power of Congress to impose these taxes, this Court said (p. 473):

> There is nothing hostile or contradictory * * * in the acts of Congress to the legislation of the States. What the latter prohibits, the former, if the business is found existing notwithstanding the prohibition, discourages by taxation. The two lines of legislation proceed in the same direction and tend to the same result. It would be a judicial anomaly, as singular as indefensible, if we should hold a violation of the laws of the State to be a justification for the violation of the laws of the Union.

We furthermore contend that even if regarded as a penalty the "tax" here involved is not open to the constitutional objection urged by the respondent. Prior to the adoption of the Eighteenth

Amendment this Court upheld the validity of the Webb-Kenyon Law (Act of March 1, 1913, c. 90, 37 Stat. 699), prohibiting the transportation in interstate commerce into any State of intoxicating liquor for purposes prohibited by the laws of such State (*Clark Distilling Co.* v. *Western Maryland Ry. Co.*, 242 U. S. 311), and also the validity of the Reed Amendment (Act of March 3, 1917, c. 162, 39 Stat. 1058, 1069), prohibiting such transportation of intoxicating liquor into any State whose laws prohibited the manufacture or sale therein of intoxicating liquor for beverage purposes (*United States* v. *Hill*, 248 U. S. 420). Regarding the power of Congress to regulate interstate commerce, the Court in the case last cited said (p. 425):

> Congress may exercise this authority in aid of the policy of the State, if it sees fit to do so.

The power conferred upon Congress by the Eighteenth Amendment to enforce its provisions by appropriate legislation may be exercised throughout the entire territorial limits of the United States and "is in no wise dependent on or affected by action or inaction on the part of the several States of the Union." *National Prohibition Cases*, 253 U. S. 350, 387. In the exercise of that power Congress may adopt any appropriate means to make the prohibition of the traffic in intoxicating liquors effective. *Everard's Breweries* v. *Day*, 265 U. S. 545, 560; *Selzman* v. *United States*, 268 U. S. 466, 468–469.

CONCLUSION

The judgment of the Circuit Court of Appeals should be reversed and that of the District Court affirmed.

Respectfully submitted.

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JANUARY, 1931.

APPENDIX

STATUTES INVOLVED

Section 35, Title II, of the National Prohibition Act, c. 85, 41 Stat. 305, 317 (U. S. C., Title 27, Sec. 52) provides:

> All provisions of law that are inconsistent with this Act are repealed only to the extent of such inconsistency and the regulations herein provided for the manufacture or traffic in intoxicating liquor shall be construed as in addition to existing laws. This Act shall not relieve anyone from paying any taxes or other charges imposed upon the manufacture or traffic in such liquor. No liquor revenue stamps or tax receipts for any illegal manufacture or sale shall be issued in advance, but upon evidence of such illegal manufacture or sale a tax shall be assessed against, and collected from, the person responsible for such illegal manufacture or sale in double the amount now provided by law, with an additional penalty of $500 on retail dealers and $1,000 on manufacturers. The payment of such tax or penalty shall give no right to engage in the manufacture or sale of such liquor, or relieve anyone from criminal liability, nor shall this Act relieve any person from any liability, civil or criminal, heretofore or hereafter incurred under existing laws.

* * * * *

Section 5 of the Willis-Campbell Act, c. 134, 42 Stat. 222, 223 (U. S. C., Title 27, Sec. 3) provides:

> That all laws in regard to the manufacture and taxation of and traffic in intoxicating liquor, and all penalties for violations of such laws that were in force when the National Prohibition Act was enacted, shall be and continue in force, as to both beverage and nonbeverage liquor, except such provisions of such laws as are directly in conflict with any provision of the National Prohibition Act or of this Act; but if any act is a violation of any of such laws and also of the National Prohibition Act or of this Act, a conviction for such act or offense under one shall be a bar to prosecution therefor under the other. All taxes and tax penalties provided for in section 35 of Title II of the National Prohibition Act shall be assessed and collected in the same manner and by the same procedure as other taxes on the manufacture of or traffic in liquor.
>
> * * * * *

Section 701, Paragraph 9, of the Revenue Act of 1924, c. 234, 43 Stat. 253, 327 (U. S. C., Title 26, Sec. 206) provides:

> Every person carrying on the business of a brewer, distiller, wholesale liquor dealer, retail liquor dealer, wholesale dealer in malt liquor, retail dealer in malt liquor, or manufacturer of stills, as defined in section 3244 as amended and section 3247 of the Revised Statutes, in any State, Territory, or District of the United States contrary to the laws of such State, Territory, or District, or in any place therein in which carrying on such business is prohibited by local or municipal law, shall pay, in addition to all other taxes,

special or otherwise, imposed by existing law or by this Act, $1,000. The payment of the tax imposed by this subdivision shall not be held to exempt any person from any penalty or punishment provided for by the laws of any State, Territory, or District for carrying on such business in such State, Territory, or District, or in any manner to authorize the commencement or continuance of such business contrary to the laws of such State, Territory, or District, or in places prohibited by local or municipal law.

The taxes imposed by this section shall, in the case of persons upon whom a corresponding tax is imposed by section 1001 of the Revenue Act of 1921, be in lieu of such tax.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1929.

No. ~~300~~ 74

UNITED STATES OF AMERICA,

Petitioner,

versus

ANTHONY LaFRANCA,

Respondent.

Reply for Respondent in Opposition to the Petition for Writ of Certiorari.

E. HOWARD M'CALEB,
Counsel for Anthony LaFranca,
Respondent.

MONTGOMERY-ANDREE PRINTING CO. INC., 430-432 CHARTRES, N.O.

SUBJECT INDEX.

	Page
SUMMARY OF ARGUMENT	1
ARGUMENT	2-6
(1) Penalties, Not Taxes Involved	2
(2) Action Barred by Sec. 5, Willis Campbell Act	2
(3) Action Barred by Fifth Amendment Const.	3
(4) Paragraph 9 of Section 701, Revenue Act of 1924, is Unconstitutional Upon Assessment Made and Doubled Under Section 35 of National Prohibition Act	5
CONCLUSION	6

CITATION OF AUTHORITIES.

CASES:

Coffey v. United States, 116 U. S. 445	4
Hebert v. Louisiana, 272 U. S. 312	5
Lipke v. Lederer, 259 U. S. 557	2, 3, 5
Murphy v. United States, 272 U. S. 630	4
Regal Drug Corp. v. Wardell, 260 U. S. 386	2
Stone v. United States, 167 U. S. 184	3
U. S. v. Bullinger, 290 Fed. 395	4
U. S. v. Cases Champagne, 9 Fed. (2nd) 710	3
U. S. v. Chouteau, 102 U. S. 603	4, 5
U. S. v. Gates, Fed. Cases No. 15,191	4
U. S. v. Lanza, 260 U. S. 377	5
U. S. v. Lechenger, 173 Fed. 1023	3
U. S. v. Lezynsky, Fed. Cases No. 8279	5
U. S. v. McKee, Fed. Cases No. 15,688	3, 5
U. S. v. Mount Clemens Bev. Co., 23 Fed. (2nd) 885	4
U. S. v. One Ford Coupe, 272 U. S. 321, 326	3

STATUTES:

National Prohibition Act, Sec. 35, Title 2, Revenue Act 1924, Sec. 701, par. 9	2, 5
Reed Amendment, Act March 3, 1917, c. 162, 39 Stat. 1058, 1069	6
Rev. Stat., Sec. 3244 (U. S. C. A. Title 26, Sec. 205)	4
Rev. Stat., Sec. 3176	2
Webb Kenyon Law, 37 Stat. 699	5
Willis Campbell Act, Sec. 5, 42 Stat. 222, 223 (U. S. C. A. Title 27, Section 3)	2, 3, 4

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1929.

No. 800

UNITED STATES OF AMERICA,

Petitioner,

versus

ANTHONY LaFRANCA,

Respondent.

Reply for Respondent in Opposition to the Petition for Writ of Certiorari.

SUMMARY OF ARGUMENT.

This application should be denied. The reasons advanced by the Government for the granting of the writ are in discord with the settled jurisprudence of this Court.

The petition for allowance of the writ is apprehensive of a state of facts which does not exist in this case, and misconstrues the effect of the decision of the Circuit Court of Appeals, (Petition, pages 7, 8 and 9).

ARGUMENT.

(1) The suit here is one for penalties, and not taxes. (See *Lipke v. Lederer, 259 U. S. 557; Regal Drug Co. v. Wardell, 260 U. S. 386).*

The petition seeks to recover taxes under Sec. 3244 R. S. as doubled by Sec. 35 of the National Prohibition Act; (thereby changing its nature from a tax to a penalty) a penalty for failure to file a return under Section 3176 R. S.; A special tax under Section 701 of the Revenue Act of 1924 as doubled by Section 35 of the N. P. A. (thereby changing its nature from a tax to a penalty) and for a further penalty of $500.00 under Section 35 of the National Prohibition Act, upon retail liquor dealers for selling liquor in violation of said National Prohibition Act.

The Circuit Court of Appeals held in conformity with the jurisprudence that the taxes under the Internal Revenue laws when doubled by Section 35 of the National Prohibition Act and assessed under the National Prohibition Act are penalties.

(2) It was further held that the limitations of Section 5 of the Willis Campbell Act, barring prosecution under the Internal Revenue Laws and under National Prohibition Act where there was a former conviction under one or the other, would apply to the case at bar.

The Circuit Court of Appeals did not decide, as the Government contends in its petition, that whenever an act

is a violation of the National Prohibition Act and also gives rise to liability for a **tax** under the Internal Revenue laws that it must elect whether it will collect the tax or prosecute the offender. If such were the case, the application would be well taken by virtue of *U. S. v. One Ford Coupe, 272 U. S. 321, 326.* It is conceded by us that one may be punished for law violation and be liable for taxes for dealing in the prohibited business. That is not the situation here. For the Government does not seek to recover taxes lost, but asks for the assessment of penalties incurred by law violation for which the defendant had already been punished. The Court below held that this suit was in contravention with the limitations expressed in Section 5 of the Willis Campbell Act and the use of the National Prohibition Act as a yardstick in doubling the taxes and making them penalties could not defeat the obvious intention of Congress in providing limitations upon the right of the Government to proceed.

(3) The position taken by the application is untenable, for, if the proceeding here is not barred by the Willis Campbell Act as the Circuit Court of Appeals held, it is barred by the Fifth Amendment of the Constitution prohibiting double jeopardy. That this suit is for penalties has been concluded by *Lipke v. Lederer, supra.* Therefore, if the suit is not barred by Section 5 of the Willis Campbell Act, as being a prosecution under the Internal Revenue Laws, it is barred because it is seeking a second punishment against the defendant for the same act, in violation of the Constitution. (See *U. S. v. McKee Federal cases No. 15,688; U. S. v. Lechenger, 173 Fed. 1023; U. S. v. Cases of Champagne, 9 Fed. (2nd) 710; Stone v. U. S., 167 U. S.*

184; Coffey v. U. S., 116 U. S. 445; U. S. v. Chouteau, 102 U. S. 603; U. S. v. Gates Federal Cases No. 15,191; Murphy v. U. S., 272 U. S. 630.

Discussion of these cases is unnecessary except to say that a second prosecution is prohibited when the parties are the same and the same act or offense is sought to be punished. It is suggested by petitioner's brief that the offense is not the same because in the prosecution for selling whiskey the Government had only to prove the sale; whereas under the allegations of this suit for penalties, there must be evidence that the defendant was a "retail liquor dealer". In this statement petitioner errs, because the Internal Revenue laws define who are retail liquor dealers, and no evidence on this fact is necessary. (See *Revised Statutes, Sec. 3244, U. S. C. A. Title 26 Section 205).*

It is unimportant whether the Circuit Court of Appeals is correct in its interpretation of the limitation of Section 5 of the Willis Campbell Act, inasmuch as the result in denying the prayer of the suit is in accord with the jurisprudence. For if the penalties sought to be recovered are not barred by the Willis Campbell Act, the authorities above cited hold conclusively that the judgment prayed for could not be granted without placing the defendant twice in jeopardy, in contravention of the Fifth Amendment of the Constitution.

A word with reference to the authorities relied on by the Government.

U. S. v. Mount Clemens Beverage Co. (E. D. Mich. 23 F. (2nd) 885, and *U. S. v. Bullinger (E. D. N. Y.) 290*

Fed. 395, are directly in conflict with the jurisprudence of this Court in *U. S. v. Chouteau, supra; In re Lezynsky, Fed. Cases No. 8279*, is in conflict with *U. S. v. McKee, supra*, (the *McKee* case being identical with the case at bar). In passing, it may be observed that the *McKee* case was cited and quoted with approval by this Court in *Coffey v. U. S., supra*. Other cases cited in the Government's brief are without application to the issues here involved.

(4) Another point raised by us in this case, but only in the alternative, is the unconstitutionality of paragraph 9, Section 701 of the Revenue Act of 1924. This act is unconstitutional because of the manner of its attempted use in this case. For when the tax levied by this section is doubled and assessed under Section 35 of the National Prohibition Act, it becomes a penalty and not a tax. (See *Lipke v. Lederer, supra)*.

Having thus lost the character of a tax, we challenge the right of the United States to penalize a person for violation of a State law without impinging upon the power reserved to the States by the Tenth Amendment of the Constitution. This apt conclusion is apparent, from the decisions of this Court in *U. S. v. Lanza, 260 U. S. 377* and *Hebert v. Louisiana, 272 U. S. 312*.

The reasoning of the Government is inapplicable because it is assuming that what is being laid is a tax. The authorities cited, therefore, have no bearing on our contention.

The citation by the Government of the Webb Kenyon law (37 Stat. 699) and authorities upholding its valid-

ity, in support of the statute here, serves no plausible analogy to the attack made by us.

The Webb Kenyon Law and the Reed Amendment (Act of March 3, 1917, c. 162, 39 Stat. 1058, 1069), were sustained upon the inherent power of Congress to regulate interstate commerce.

The point raised in the Court below was that Congress has no power to penalize a person for violating a State law.

CONCLUSION.

The case was decided correctly below. There is no valid reason for the granting of this application. The petition for *certiorari* should be denied.

Respectfully submitted,

E. HOWARD M'CALEB,
Attorney for Anthony LaFranca,
Respondent.

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1930.

No. 74

THE UNITED STATES OF AMERICA,
Petitioner,

versus

ANTHONY LA FRANCA.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

BRIEF FOR ANTHONY LA FRANCA.

E. HOWARD M'CALEB,
E. HOWARD M'CALEB, JR.,
Attorneys.

January, 1931.

BONTGOMERY-ANDREE PRINTING CO. INC., 430-432 CHARTRES, N. O.

SUBJECT INDEX.

	Page
Opinions below	1
Statutes involved	1
Statement	5
Questions presented	5
ARGUMENT:	
I. The suit is one for penalties and not taxes	6
II. The suit being for the recovery of penalties it is barred by Section 5 of the Willis-Campbell Act	9
III. The suit being for the recovery of penalties, and the defendant having already been punished by fine and imprisonment for the same act or offense, it is barred by the Fifth Amendment of the Constitution prohibiting double jeopardy	10
IV. Assessments made and doubled under Section 35 of the National Prohibition Act, based on Paragraph 9, Section 701 of the Revenue Act of 1924, produces an unconstitutional use of the latter statute, in violation of the Tenth Amendment of the Constitution	19
Conclusion	24

CITATIONS.

Cases:	Page
Albrecht v. United States, 273 U. S. 1	12
Coffey v. Noel, 11 Fed. (2nd), 399	6
Coffey v. United States, 116 U. S. 445	15
Child Labor Tax Case, 259 U. S. 20	9
Clark Distilling Co. v. Western Maryland R. Co., 242 U. S. 315	23
Denver v. Holmes Savings Bank, 236 U. S. 101	11
Dukich v. Blair, 3 Fed. (2nd) 302 (270 U. S. 670)	6
Ex parte Lange, 18 Wall. 168 (85 U. S. XXI 876)	11, 13-14
Feinberg v. United States, 2 Fed (2nd) 955	11
Graham v. West Virginia, 224 U. S. 616	19
Hebert v. Louisiana, 272 U. S. 312	12, 21
In re Leszynsky, Federal Cases No. 8279	19

CITATIONS—(Continued).

Cases:

	Page
Jasper v. Hellmich, 4 Fed. (2nd), 852	6
Ledbetter v. United States, 170 U. S. 607	12
Lipke v. Lederer, 259 U. S. 557	6, 7, 8, 9, 20
Mound Coal Co. v. Jeffrey Mfg. Co., 233 Fed. 956	11
Murphy v. United States, 272 U. S. 630	15
Nalle v. Oyster, 230 U. S. 165	10
O'Sullivan v. Felix, 233 U. S. 318	8
Regal Drug Corporation v. Wardell, 260 U. S. 386	6, 7, 8, 20
Rosen v. United States, 271 Fed. 651	11
United States v. Bullinger, 290 Fed. 395	19
United States v. Chouteau, 102 U. S. 603	11, 12, 19
United States v. Gates, Federal Cases, No. 15191	15, 19
United States v. Lanza, 260 U. S. 377	21, 22
United States v. McKee, Federal Cases No. 15688	14, 19
United States v. Mount Clements Beverage Co., 23 Fed. (2nd), 885	19
United States v. One Ford Coupe, 272 U. S. 321	6, 8
United States v. Wiltberger, 5 Wheat. 76	18
United States v. Yuginovich, 256 U. S. 450	8

Statutes:

	Page
National Prohibition Act, c. 85, 41 Stat. 305, Title II, sec. 35 (U. S. C., title 27, Sec. 52)	1, 6, 7, 8, 9, 11, 12, 16, 20
National Prohibition Act, c. 85, 41 Stat. 316, Title II, sec. 29 (U. S. C., title 27, Sec. 46)	4, 16
Reed Amendment (Act of Mar. 3, 1917, c. 162, 39 Stat. 1058)	23
Revenue Act of 1924, c. 234, 43 Stat. 253, Sec. 701, par. 9 (U. S. C., title 26, Sec. 206)	3, 7, 20, 23

Revised statutes:

	Page
Sec. 3176, as amended	6
Webb-Kenyon Law (Act of Mar. 1, 1913, c. 90, 37 Stat. 699)	23
Willis-Campbell Act, c. 134, 42 Stat. 222, Sec. 5 (U. S. C., title 27, Sec. 3)	2, 18

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OPINIONS BELOW.

The opinion of the District Court *(R. 7)* is reported in *26 F. (2d) 706*, and that of the Circuit Court of Appeals *(R. 28)* in *37 F. (2d) 269*.

STATUTES INVOLVED.

Section 35, Title II, of the National Prohibition Act, c. 85, 41 Stat. 305, 317 *(U. S. C., Title 27, Sec. 52)* which provides:

> "All provisions of law that are inconsistent with this Act are repealed only to the extent of such

inconsistency and the regulations herein provided for the manufacture or traffic in intoxicating liquor shall be construed as in addition to existing laws. This Act shall not relieve anyone from paying any taxes or other charges imposed upon the manufacture or traffic in such liquor. No liquor revenue stamps or tax receipts for any illegal manufacture or sale shall be issued in advance, but upon evidence of such illegal manufacture or sale a tax shall be assessed against, and collected from, the person responsible for such illegal manufacture or sale in double the amount now provided by law, with an additional penalty of $500 on retail dealers and $1,000 on manufacturers. The payment of such tax or penalty shall give no right to engage in the manufacture or sale of such liquor, or relieve anyone from criminal liability, nor shall this Act relieve any person from any liability, civil or criminal, heretofore or hereafter incurred under existing laws."

Section 5 of the Willis-Campbell Act, c. 134, 42 Stat. 222, 223 *(U. S. C., Title 27, Sec. 3)*, which provides:

"That all laws in regard to the manufacture and taxation of and traffic in intoxicating liquor, and all penalties for violations of such laws that were in force when the National Prohibition Act was enacted, shall be and continue in force, as to both beverage and nonbeverage liquor, except such provisions of such laws as are directly in conflict with any provision of the National Prohibition Act or of this Act; but if any act is a violation of any of such laws and also of the National Prohibition Act or of this Act, a conviction for such act or offense under one shall be a bar to prosecution therefor under the other. All taxes and tax penalties

provided for in section 35 of Title II of the National Prohibition Act shall be assessed and collected in the same manner and by the same procedure as other taxes on the manufacture of or traffic in liquor."

Section 701, Paragraph 9, of the Revenue Act of 1924, c. 234, 43 Stat. 253, 327 *(U. S. C., Title 26, Sec. 206)*, which provides:

"Every person carrying on the business of a brewer, distiller, wholesale liquor dealer, retail liquor dealer, wholesale dealer in malt liquor, retail dealer in malt liquor, or manufacturer of stills, as defined in section 3244 as amended and section 3247 of the Revised Statutes, in any State, Territory, or District of the United States contrary to the laws of such State, Territory, or District, or in any place therein in which carrying on such business is prohibited by local or municipal law, shall pay, in addition to all other taxes, special or otherwise, imposed by existing law or by this Act, $1,000. The payment of the tax imposed by this subdivision shall not be held to exempt any person from any penalty or punishment provided for by the laws of any State, Territory, or District for carrying on such business in such State, Territory, or District, or in any manner to authorize the commencement or continuance of such business contrary to the laws of such State, Territory, or District, or in places prohibited by local or municipal law.

The taxes imposed by this section shall, in the case of persons upon whom a corresponding tax is imposed by section 1001 of the Revenue Act of 1921, be in lieu of such tax."

Section 29, Title II of the National Prohibition Act, c. 85, 41 Stat. 316 *(U. S. C. Title 27, Sec. 46)* which provides:

> "Any person who manufactures or sells liquor in violation of this chapter shall for a first offense be fined not more than $1,000 or imprisoned not exceeding six months, and for a second or subsequent offense shall be fined not less than $200 nor more than $2,000 and be imprisoned not less than one month nor more than five years.
>
> Any person violating the provisions of any permit, or who makes any false record, report, or affidavit required by this chapter, or violates any of the provisions of this chapter, for which offense a special penalty is not prescribed, shall be fined for a first offense not more than $500; for a second offense not less than $100 nor more than $1000, or be imprisoned not more than ninety days; for any subsequent offense he shall be fined not less than $500 and be imprisoned not less than three months nor more than two years. It shall be the duty of the prosecuting officer to ascertain whether the defendant has been previously convicted and to plead the prior conviction in the affidavit, information, or indictment. The penalties provided in this chapter against the manufacture of liquor without a permit shall not apply to a person for manufacturing nonintoxicating cider and fruit juices exclusively for use in his home, but such cider and fruit juices shall not be sold or delivered except to persons having permits to manufacture vinegar."

STATEMENT.

The case has been correctly stated by the United States in its brief. *(Brief of the United States 5-7).* In order to avoid repetition, we, accordingly, adopt the Government's statement.

Questions Presented:

(1) Whether a suit for alleged taxes derived from Sec. 3244 Revised Statutes, Sec. 701, Paragraph 9 of the Revenue Act of 1924, and doubled and **assessed** under Sec. 35, Title II of the National Prohibition Act, is one for taxes or penalties.

(2) If the suit is one for penalties and not for taxes, whether recovery is barred, because of the defendant's previous conviction under the National Prohibition Act for the same act or acts, by virtue of Sec. 5 of the Willis-Campbell Act.

(3) If the suit is one for penalties and not for taxes, whether recovery is barred, because of the defendant's previous conviction under the National Prohibition Act for the same act or acts, by virtue of the Fifth Amendment of the Constitution prohibiting double jeopardy.

(4) If the suit is one for penalties and not for taxes, whether recovery of a penalty assessed under Sec. 35 of the National Prohibition Act and based upon Section 701, paragraph 9 of the Revenue Act of 1924, is barred because of a claimed unconstitutional result by virtue of the Tenth Amendment of the Constitution.

ARGUMENT.

I.

The suit is one for penalties and not taxes.

It is of first importance to determine whether this suit is for taxes or for penalties. For, confessedly, if it be determined that this is a suit for a **pure tax,** then the remaining points raised by us are of no avail, as we would be submerged by the jurisprudence of this Court. *(U. S. v. One Ford Coupe, 272 U. S. 321, 326).*

But, the suit is not for taxes. *Lipke v. Lederer, 259 U. S. 557; Regal Drug Co. v. Wardell, 260 U. S. 386; Dukich v. Blair, 3 Fed. (2nd) 302, 270 U. S. 670; Jasper v. Hellmich, 4 Fed. (2nd) 852; Coffey v. Noel, 11 Fed. (2nd) 399.*

The amount sought to be recovered is $2,042.18 *(R. 5).* This sum is made up of several items. These items will be discussed in order.

One item of the total alleged to be due is for $4.68. This amount is characterized in the petition as a penalty provided for by Sec. 3176 of the Revised Statutes, because the defendant *(being a retail liquor dealer)* failed to file a return. That this item is a penalty for not complying with the law is not open to argument.

Likewise recovery sought of the penal sum of $500 for being a retail liquor dealer in violation of Sec. 35 of the National Prohibition Act, means that such recovery is based on punishment for law violation.

The other two items sought to be recovered are the sum of $37.50 retail liquor dealer's tax under Sec. 3244 of the Revised Statutes assessed and doubled under Sec. 35 of the National Prohibition Act and $1500 *(nine months' special tax for being a retail liquor dealer in violation of the law of Louisiana as provided for by Section 701, paragraph 9 of the Revenue Act of 1924)*, and assessed and doubled under Sec. 35 of the National Prohibition Act.

It is our claim that suit for recovery of the above items assessed and doubled by Sec. 35 of the National Prohibition Act is one for **penalties** and not taxes. And we claim further that the matter is not open to argument, having been definitely concluded by *Lipke v. Lederer*, and *Regal Drug Co. v. Wardell, supra.*

In *Lipke v. Lederer* the suit was for an injunction to restrain the collection by distraint of an assessment made under Section 35 of the National Prohibition Act. The injunction was granted and upheld by this Court because the Government was seeking the collection of penalties and not taxes. In determining that the assessment was a penalty and not a tax, the opinion said *(pp. 561-562)*:

> "The mere use of the word 'tax' in an act primarily designed to define and suppress crime is not enough to show that within the true intendment of the term a tax was laid. Child Labor tax case, 259 U. S. 20. When by its very nature the imposition is a penalty it must be so regarded. Helwig v. U. S., 188 U. S. 605. Evidence of crime Section 29 is essential to assessment under Section 35. It lacks all the ordinary characteristics of a tax whose primary function 'is to provide for the support of the

> Government', and clearly involves the idea of punishment for infraction of the law, the definite function of a penalty."
>
> *O'Sullivan v. Felix, 233 U. S. 318.*

Regal Drug Co. v. Wardell was a similar case to that of *Lipke v. Lederer.* This Court merely affirmed the law as laid down in *Lipke v. Lederer*, viz: That where a tax is assessed and doubled under Section 35 of the National Prohibition Act, an act primarily designed to suppress crime, such assessment loses all characteristics of a tax, and becomes a penalty or punishment for violation of law.

The Court will note that recovery is sought here of the same kind of penalties under Sec. 35 of the National Prohibition Act as were assessed in *Lipke v. Lederer, supra*, and *Regal Drug Co. v. Wardell, supra.*

The subsequent case of *United States v. One Ford Coupe (272 U. S. 321)*, did not alter or in any way change the law laid down by the Court in *Lipke v. Lederer* and *Regal Drug Co. v. Wardell.* In fact, the opinion cites *Lipke v. Lederer* with approval and distinguishes it from the case decided. (See *U. S. v. One Ford Coupe, 272 U. S., at page 328).*

In the *One Ford Coupe* case, the court merely reaffirmed what it had held in *United States v. Yuginovich, 256 U. S. 450*, and kindred cases, namely, that the Government may tax what it prohibits. We have no dispute with this jurisprudence. The *Ford Coupe* case was a forfeiture

proceeding under Section 3450 of Revised Statutes, the forfeiture of the automobile being sought because the Government was defrauded of the tax on the liquor. The Court held that the tax as laid and assessed under the internal revenue laws was a true tax.

But the situation here is different. The assessments here were not made under any internal revenue laws, but under a law primarily designed to suppress crime, viz: Sec. 35 of National Prohibition Act, and are in truth **penalties** incurred by law violation and not taxes. *Lipke v. Lederer, supra; Child Labor Tax Case, 259 U. S. 20.*

II.

The suit being for the recovery of penalties, it is barred by the Section 5 of Willis-Campbell Act.

The defendant, La Franca, has plead guilty and has been punished for the acts or offenses which the government attempts to punish him for in this suit. The conviction of the defendant is pleaded in the petition. *(R. 3, 4).*

The Circuit Court of Appeals held that the limitations of Section 5 of the Willis-Campbell Act, barring prosecution under the Internal Revenue Laws and under the National Prohibition Act where there was a former conviction under one or the other would apply to the case at bar. *(R. 28-30).*

This opinion speaks for itself. We, therefore, devote our argument to the other points of law raised below and not covered by the Court's opinion.

III.

The suit being for the recovery of penalties, and the defendant having already been punished by fine and imprisonment for the same act or offense, it is barred by the Fifth Amendment of the Constitution prohibiting double jeopardy.

It is of no moment, whether this Court agrees with the reasoning of the Court below in finding for the defendant. The decree is correct. Because if the action is not barred by Section 5 of the Willis-Campbell Act, it is barred by the Constitution, *(viz: The Fifth Amendment thereof)* prohibiting double jeopardy.

But it is said by the United States in its brief that, although we assigned as error on appeal the overruling of this plea, *(R. 24)* that because the record doesn't show that a bill of exception was taken to the overruling of the said plea, it is not now available to us.

This contention is without merit. The plea of former jeopardy in this case was practically in the form of a general demurrer, inasmuch as the Government had plead in its petition the conviction of the defendant for the same act or acts for which it is now trying to again punish him. *(See R. pages 3-4, Petition paragraph 14).* It was not necessary to take evidence to substantiate the facts alleged in the plea when those facts were admittedly part of the Government's pleadings. Hence, when the plea was overruled an exception was unnecessary as all facts or questions bearing on the plea were contained on the face of the pleadings. See *Nalle v. Oyster, 230 U. S. 165;*

Denver v. Holmes Savings Bank, 236 U. S. 101; Mound Coal Co. v. Jeffrey Mfg. Co., 233 Fed. 956 (C. C. A. 4).

Rosen v. U. S. (C. C. A. 2), 271 Fed. 651, and *Feinberg v. U. S. (C. C. A. 8), 2 Fed. (2nd) 955*, cited by the Government are inapposite.

Although the Fifth Amendment of the Constitution prohibiting double jeopardy has been given a very broad and liberal construction by this Court *(Ex parte Lange, 18 Wall 168; U. S. v. Chouteau, 102 U. S. 603)*, let us see whether the plea of former jeopardy here, meets the original test of practice. Defendant here, as shown by the record, was prosecuted criminally and convicted for the same acts for which the United States is now attempting to recover these penalties. The parties are the same, the acts on which recovery is sought are the same, and also the fact that jeopardy attached to the defendant at the time of his plea of guilty, leaving only for this Court to decide whether or not this action is one in which former jeopardy can be sustained.

The above statement is not altogether admitted by the Government. For it contends that the offense which was committed is not the same. However, an examination of Sec. 35 of the National Prohibition Act, under which recovery of the penalties are sought, discloses that "* * * but upon evidence of such illegal manufacture or sale a *tax* shall be assessed against, and collected from, the person responsible * * *". *(Word in italics ours)*. So that the only evidence required to recover the penalty according to the very terms of Sec. 35 of this Act, is proof of the unlawful sale or sales for which the defendant had

already been punished. It is conceded that a person in the doing of a criminal act may commit more than one offense or offend the laws of more than one sovereign, or several laws of the same sovereign. To this effect are the holdings, in *Hebert v. Louisiana, 272 U. S. 312*, and *Albrecht v. U. S., 273 U. S. 1.* But these cases do not decide that where a person has committed one offense and has been prosecuted and convicted, that he can be again proceeded against for the same offense and be punished by use of the same and identical evidence and no more.

It is also contended by the Government that it was compelled to prove that La Franca was a retail liquor dealer, in addition to the proof of the unlawful sale of the liquor. But the contention is erroneous because the statute *(Sec. 35 National Prohibition Act)* requires only evidence of the **illegal sale** as a condition precedent to the assessment of the punishment. Accordingly, *Ledbetter v. U. S., 170 U. S. 607, 610*, relied on in Government's brief *(P. 32)* is without application.

Having thus established that the parties are the same, that the evidence used is identical and that the act of the defendant is the same, it is in accordance with the Fifth Amendment of the Constitution and with the jurisprudence of this Court, that the plea of former jeopardy should be sustained.

One of the early leading cases on the question of former jeopardy that amply covers the situation here is that of *U. S. v. Chouteau, 102 U. S. 603 (26 L. Ed. 246).* In that case the United States filed suit on a distiller's bond against the principal and sureties thereof for penal-

ties alleged to have been incurred because of the distiller's violation of the bond. It appeared that two indictments had been found against the distiller, one of which contained counts for the specific offenses which constituted the whole ground and cause of the present action. Under the authority of an act of Congress, a compromise with the Government was effected by which a specific sum was paid by the distiller in full settlement of said indictments and prosecutions, and said indictments were accordingly dismissed and abandoned. The question presented to the Court was whether sureties on a distiller's bond should be subjected to a penalty attached to the commission of an offense when the principal has effected a full and complete compromise with the Government, under sanction of an act of Congress, of prosecutions based upon the **same offense.**

Mr. Justice Field delivered the opinion of the Court and in holding that former jeopardy will apply said:

> "Admitting that the penalty may be recovered in a civil action, as well as by a criminal prosecution, it is still as a punishment for the infraction of the law. The term penalty involves the idea of punishment, and its character is not changed by the mode in which it is inflicted, whether by a civil action or a criminal prosecution. The compromise pleaded must operate for the protection of the distiller against subsequent proceedings as fully as a former conviction or acquittal. He has been punished in the amount paid upon the settlement for the offense with which he was charged, and that should end the present action, according to the principle on which a former acquittal or conviction may be invoked to protect against a second punishment for the same offense. To hold otherwise would be to sacrifice a great principle to the

mere form of procedure, and to render settlements with the Government delusive and useless.

"Whilst there has been no conviction or judgment in the criminal proceedings against the distiller here, the compromise must on principle have same effect. The Government through its appropriate officers has indicated, under the authority of an Act of Congress, the punishment with which it will be satisfied. The offending party has responded to the indication and satisfied the Government. It would, therefore, be at variance with right and justice to exact in a new form of action the same penalty. For, as it was justly said by this Court, in Ex parte Lange, speaking through Mr. Justice Miller, 'If there is anything settled in the jurisprudence of England and America, it is that no man can be twice lawfully punished for the same offense. And, though there has been nice questions in the application of this rule to cases in which the act charged was such as to come within the definition of more than one statutory offense, or to bring the party within the jurisdiction of more than one court, there has never been any doubt of its entire and complete protection of the party where a second punishment is proposed in the same court, on the same facts, for the same statutory offense. The principle finds expression in more than one form in the maxims of the common law.'" *(18 Wall. 168 [85 U. S. XXI, 876]).*

In the case of *U. S. v. McKee (Federal cases 15,688)*, the defendant had been convicted and punished under a section of the Revised Statutes for conspiring with certain distillers to defraud the United States by unlawfully removing distilled spirits without payment of the taxes thereon. He was afterwards sued in a civil action by the United States under another section, to recover a penalty of double the amount of the taxes lost by the con-

spiracy and fraud. The Court held that the two alleged transactions were but **one,** and the suit for the **penalty** was barred by the judgment in the criminal case. The decision was put on the ground that the defendant could not be twice punished for the same crime, and that the former conviction and judgment were a bar to the suit for the penalty.

It is our claim that the *McKee* case is identical in principle with the case at bar. This case has been cited and quoted from with approval by this Court in *Coffey v. U. S., 116 U. S. 445.*

Another case upholding the principle we are endeavoring to maintain here is *United States v. Gates (Federal cases No. 15,191).* The defendant in that case was indicted and convicted, under Act of August 30th, 1842, for smuggling and clandestinely introducing into the United States certain goods with intent to defraud the revenue of the Government, and was sentenced by fine and imprisonment. Thereafter, a civil suit was filed against Gates by the Government, to recover the penalty imposed by statute, for landing the same goods without a permit. The defendant pleaded in bar, the conviction, sentence and punishment aforesaid, and the Court held that by general principles of law, the Government having once punished the defendant was prohibited from prosecuting him again for acts constituting the same offense.

The case of *Murphy v. United States, 272 U. S. 630,* may be likened to the case here by analogy. In that case the defendant had been acquitted of maintaining a liquor nuisance on their premises in violation of Section 21 of the National Prohibition Act, and their place was sub-

sequently proceeded against under the provisions of Section 22 *in rem*, with a view to closing the same for one year as a result of the same violation of law for which they were acquitted. They plead former jeopardy, and the Court in denying their plea said that it could be denied only upon the theory that a proceeding under Section 22 of the National Prohibition Act was not a punishment and that if it were a punishment the plea of former jeopardy would have to be sustained.

The Government contends that the constitutional limitation on the right to proceed twice against the same person for the same offense, is of no avail if Congress designates the penalties to be imposed as cumulative as distinguished from alternative.

This contention is based upon a false premise, because it is assuming that the penalties assessed in Section 35 of the National Prohibition Act are cumulative with the penalties provided for in Sec. 29 of the Act, under which the defendant has already been punished. But there is no language contained in Section 35 or in other parts of the Act or of the Willis Campbell Act to warrant such a conclusion. On the contrary, Section 29 of the Act clearly sets forth the punishments which are to be inflicted. For the pertinent part of Section 29 reads:

> "Any person who manufactures or sells liquor in violation of this chapter shall for a first offense be fined not more than $1000, or imprisoned not exceeding six months * * *."

This is indicative that Congress when enacting this section intended that the penalties of fine and imprisonment should be alternative for first offenders.

There is no language in Section 35 that evidences an intention on the part of Congress to make the penalties therein assessed, cumulative with the penalties contained in Section 29.

Section 35 was evidently intended to and does cover cases of violation of regulations as defined in Sec. 1 whereby a party holding a permit to engage in the manufacture and sale of intoxicating liquors under specified conditions conformable to the Eighteenth Amendment and the National Prohibition Act and who has paid a tax under Internal Revenue Statutes, has violated these conditions, and regulations resulting in an illegal manufacture or sale. *Noscuntur a sociis.* The interpretation contended for by us is manifested by the letter and spirit of Sec. 35, and rejects the idea of an additional penalty on conviction of an illegal manufacture and sale of intoxicating liquors fully covered by Sec. 29 disassociated from those regulations and conditions governing the traffic in intoxicating liquors. In short, a license or permit to engage in a lawful business does not authorize an illegal act under the guise of such a permit.

The Willis Campbell Act afterwards passed, reenacted the former internal revenue laws, taxes and penalties. It is unreasonable to assume as the Government contends that because Congress reenacted all the statutes in force prior to the Eighteenth Amendment, that it intended that all the penalties thereunder should be cumulative and

in addition to the penalties provided for in the National Prohibition Act. It is submitted that a sound interpretation is, that Congress in reenacting the former internal revenue laws intended to discourage illicit liquor enterprises by taxation, by the larger penalties provided for under certain sections of the Revised Statutes, and by giving the enforcement officers more laws to work with.

But this law manifests no intention to cumulate penalty upon penalty, because it will be remembered that Section 5 of this Act says:

> "* * * but if *any act* is a violation of any of such laws and also of the National Prohibition Act or of this Act, a conviction for such *act* or offense under one shall be a bar to prosecution therefor under the other." (Words in italics ours).

This limitation is nothing more than an expression of legislative intention to curtail proceedings for additional or subsequent punishment after conviction.

We therefore submit that unless the statute in plain and unmistakable terms sets forth that the penalties therein are cumulative, a former conviction plead against the subsequent prosecution for the same act or offense will bar the second proceeding. *United States v. Wiltberger, 5 Wheat. 76, 95.*

Hence, it follows that the cases cited by the Government on this point have no application. For these were all cases where the statute in unmistakable terms provided for cumulative punishment.

The case of *In re. Leszynsky, Fed. Cas. No. 8279*, relied on by the Government, is a colorful illustration of a statute providing for cumulative penalties. The statute, Sec. 3318, Revised Statutes, specified a penalty of $100 in addition to imprisonment and fine. The opinion distinguishes the case from that of *United States v. McKee* and *United States v. Gates, supra*, relied on by us.

United States v. Mt. Clemens Beverage Co. (E. D. Mich.) 23 Fed. (2nd) 885; United States v. Bullinger (E. D. N. Y.) 290 Fed. 395, relied on by the Government are at variance with the law laid down by this Court in *United States v. Chouteau, supra.*

The case of *Graham v. West Virginia, 224 U. S. 616*, also relied on by the United States is without application to the case at bar. In that case additional punishment was imposed on a defendant upon a showing that he was a second offender. It was not a case of producing the same evidence to convict for the same offense. But additional evidence, that of former conviction was necessary to give the Court the right to mete out the additional punishment.

IV.

Assessments made and doubled under Section 35 of the National Prohibition Act, based on Paragraph 9, Section 701 of the Revenue Act of 1924, produces an unconstitutional use of the latter statute, in violation of the Tenth Amendment of the Constitution.

This point is raised by us, only in the alternative and affects the largest penalty sought to be recovered by the United States.

The petition claims a penalty of $1500 from the defendant *(See R. 3, petition par. 11)* derived and based on paragraph 9 Section 701 of the Revenue Act of 1924 and assessed and doubled under section 35 Title II of the National Prohibition Act.

The pertinent part of the basic statute reads as follows:

> "Every person carrying on the business of a brewer, distiller, wholesale liquor dealer, retail liquor dealer, * * * as defined in Section 3244, as amended and section 3247 of the Revised Statutes, in any State, Territory or District of the United States, contrary to the laws of such State, Territory, or District, * * * shall pay in addition to all other taxes special or otherwise imposed by existing law or by this Act, $1,000.00." *(From par. 9, Sec. 701 of the Act of 1924).*

This statute undoubtedly lays a tax, and an assessment under its provisions would be valid. But the Government doesn't assess under the provisions of this act. Instead it doubles the tax and assesses it under the provisions of Sec. 35, Title II of the National Prohibition Act. By this process, it transforms the tax into a **penalty** by virtue of *Lipke v. Lederer, supra,* and *Regal Drug Co. v. Wardell, supra.*

Hence the result is that the Government is attempting to penalize this defendant for violating the law of the State of Louisiana.

We challenge the right of the United States to punish a person for violating a State law. This Govern-

ment is one of the delegated powers, and all power not delegated to the United States by the Constitution is reserved to the several states. There is no power vested in the Federal system authorizing Congress to penalize a person for violating a State law and it never was the intention of Congress that Sec. 701 of the Revenue Act of 1924 could or would be used in such a manner so as to bring about an unconstitutional result.

The power granted to the Government by the Eighteenth Amendment did not give the right to impinge upon the plenary power of the States to punish violations of their own laws. For Section 2 of the Amendment reads:

> "The Congress and the several States shall have concurrent power to enforce this article by appropriate legislation."

The United States was given concurrent power with the several States to enforce prohibition. No plenary power that was vested in the sovereign State prior to the Amendment was taken away. It merely delegated the power to Congress co-extensively with the several States to prohibit the traffic in intoxicating liquors. See *U. S. v. Lanza, 260 U. S. 377.*

The powers of Congress and the several States respecting the enforcement of the Eighteenth Amendment has been fully discussed by this Court in the case of *Hebert v. Louisiana, 272 U. S. 312.* In that case Hebert was indicted in the United States Court for violation of the National Prohibition Act. While the indictment in the United States Court was pending, he was arrested and charged in the Louisiana State Court for the same offense.

Hebert challenged the right of the State Court to proceed against him under the State law, and cited Sec. 256 of the Federal Judicial Code to substantiate his plea. The Court, in denying him relief under the State law, said:

> "The Eighteenth Amendment contemplated that the manufacture of intoxicating liquor for beverage purposes may be denounced, as a criminal offense, both by the federal law and by the State law, and that these laws may not only co-exist but be given full operation independently of each other. * * *"
>
> *(U. S. v. Lanza, supra).*

This opinion not only recognizes the concurrent powers of the United States and the State of Louisiana to deal with the prohibition of intoxicating liquors, but also recognizes that the powers of each sovereign are **exclusive** as to the punishment of the crime for violating the law of that particular sovereign.

For it is said:

> "The provision in Section 256 of the Federal Judicial Code has no bearing on the authority of a State Court to entertain an accusation for an offense against the State law. That provision relates to offenses 'cognizable under the authority of the United States.' *Only offenses against the laws of the United States are cognizable under its authority. Those against State laws are cognizable only under the authority of the State. And this is true where the same acts are an offense against both a law of the United States and a law of the State.*" (Words in italics ours).

In order to sustain the validity of the result sought to be obtained here, the Government has claimed that this

statute *(Sec. 701 of the Revenue Act of 1924)* is analogous to the Reed Bone Dry Amendment, and the Webb Kenyon Law *(39 Stat. at L. 699)*. This attempted analogy is unsound, and is distinguishable from the statute here. The Reed Amendment and the Webb Kenyon law were statutes passed by Congress under the interstate commerce clause of the Constitution prohibiting generally the transportation, etc., of liquor to or from States which had enacted local prohibition statutes.

The leading case upholding the constitutionality of this type of statute is that of *James Clark Distilling Co. v. Western Maryland R. Co., 242 U. S. 315.* The attack made on the Webb Kenyon law was, not that it violated the Tenth Amendment, but was that it was not a uniform law and was further violative of the Fifth Amendment. The opinion holds that inasmuch as Congress had under its general power to regulate interstate commerce the right to prohibit the interstate transportation of liquor from one State to another, irrespective of whether the State or States were dry by local legislation or not, that merely because Congress saw fit to exercise a lesser power in making the transportation, etc., of intoxicating liquor unlawful into States which had local prohibition laws, did not make the law void for want of uniformity or violate the Fifth Amendment regarding due process of law.

The situation under the foregoing acts have no analogy to the case at bar. Under those acts, Congress

made it a crime to ship liquor into a dry state or territory. The gravamen of the offense in a case under such a statute is not the violation of the State law, but the **transportation in interstate** commerce into dry territory. Congress, by virtue of its power to regulate interstate commerce, could not punish the local law violation. No more than it could amend the Dyer Act *(prohibiting the transportation of stolen automobiles)* and declare that whoever should be guilty of stealing an automobile in violation of a state law should pay a penalty of $1000.00. The right of Congress to prohibit the transportation of stolen automobiles in interstate commerce, however, is unquestioned.

In the case at bar, Congress is attempting to penalize the violation of the law of another sovereign, a matter over which it has no jurisdiction or authority, while in the other statutes Congress is merely punishing, not the violation of a local law, but of its own law, under its power to regulate interstate commerce.

CONCLUSION.

The judgment of the Circuit Court of Appeals should be affirmed.

Respectfully submitted,

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January, 1931.

ADDENDA.

In addition to the points presented in our original brief, we desire to urge the following:

A general demurrer was filed to the petition, was overruled by the District Court and duly excepted to by respondent. (R. pp. 10, 11).

The question under this general demurrer is:

Whether the penalties provided for in *Sec. 35, Title II*, National Prohibition Act apply in every case of law violation or should be restricted to those cases where the person responsible has obtained liquor revenue stamps or tax receipts.

Sec. 35 provides: "All provisions of law that are inconsistent with this act are repealed only to the extent of such inconsistency and the regulations herein provided for the manufacture or traffic in intoxicating liquor shall be in addition to existing laws". The word "regulations" as used, refers to the regulations of the Commissioner of Internal Revenue. This word is so defined by *Section I, Title II* of the Act. The regulations, as being in addition to internal revenue laws, can only apply to non-beverage liquor (liquor used for medicinal purposes, etc.), inasmuch as the Constitution and the Prohibition Act forbid the manufacture or sale of beverage liquor.

The section proceeds: "This Act shall not relieve any one from paying any taxes or charges imposed upon the manufacture or traffic in such liquor". The words

"Such liquor" mean non-beverage liquor sold or manufactured under the regulations of the Commissioner above provided for. This sentence evidences the intention of Congress that persons who manufactured or sold liquor for non-beverage purposes under governmental regulations and permits would not be relieved from paying taxes on such liquor.

Continuing, it is provided that, "No liquor revenue stamps or tax receipts for any illegal manufacture or sale shall be issued in advance * * *". This manifests a prohibition against officers of the internal revenue bureau from issuing any revenue stamps or tax receipts to anyone manufacturing or selling liquor except where such person is a lawful dealer. And such lawful dealer is one who is doing business under Governmental regulations. In short, one who sells or manufactures non-beverage liquor. The sentence goes on "* * * but upon evidence of such illegal manufacture or sale a tax shall be assessed against, and collected from, the person responsible for such illegal manufacture or sale in double the amount now provided by law, with an additional penalty of $500.00 on retail dealers and $1000.00 on manufacturers". The words "such illegal manufacture or sale" show an intention to associate or connect the illegal manufacture or sale here with that in the beginning of the sentence, and evidences an intention to limit the assessment of the penalties imposed to cases where the person responsible has sold or manufactured liquor illegally *under the guise of Government stamps or tax receipts.*

We contend that the true intention expressed by Congress in the above sentence is as follows: that govern-

ment officers are prohibited from issuing stamps or tax receipts in advance for any law violation, but in the event any person has issued to them stamps or tax receipts and under the protection of the same commits a violation of law, then the so-called double taxes and penalties shall be imposed.

If we are right in the proposition advanced, the remaining sentence of *Sec. 35* can have no bearing on the case.

The petition does not allege that respondent sold liquor illegally after obtaining revenue stamps or tax receipts, and, therefore, under the construction of *Sec. 35* urged by us, he did not become liable for the penalties therein provided for.

The general demurrer should be maintained; otherwise, we rely on the points raised by us in the original brief.

Respectfully submitted,

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Attorneys.

SUPREME COURT OF THE UNITED STATES.

No. 74.—October Term, 1930.

The United States of America, Petitioner, *vs.* Anthony La Franca.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

[February 24, 1931.]

Mr. Justice Sutherland delivered the opinion of the Court.

Respondent was sued in a federal district court for nonpayment of taxes and penalties. The petition alleged that he had sold intoxicating liquor at various times in his restaurant, and by reason thereof had become a retail liquor dealer and incurred liabilities as follows: In the sum of $37.50, retail liquor dealer's tax under R. S. § 3244 for a period of nine months, doubled under § 35, Title 2, of the National Prohibition Act; $4.68, penalty imposed by R. S. § 3176, as amended, for failure to make and file a return as a retail liquor dealer; $1,500, special tax under § 701 of the Revenue Act of 1924 for engaging in the business of retail liquor dealer in Louisiana contrary to the law of that state, being for a period of nine months and doubled under § 35; $500, penalty, in addition to the retail liquor dealer's tax imposed by § 35.

Prior to the commencement of the action respondent had been convicted and fined upon an information filed by the United States under the National Prohibition Act, charging him with the same unlawful sales of intoxicating liquor set forth in the petition as the basis for the imposition of the taxes and penalties sought to be recovered. There is no dispute about the facts. They are alleged in the petition and, in detail, made the subject of a stipulation of the parties in the district court. Pleas of former jeopardy and of *res judicata* were overruled by the district court, a jury was waived, and judgment for the United States entered for the full amount sued for. The court of appeals reversed the judgment on the ground that the action was barred by § 5 of the Willis-Campbell Act. 37 F. (2d) 269.

The point is made that respondent failed to enter an exception to the order of the district court overruling the pleas, but, since the facts were agreed to by stipulation entered of record, the failure to note an exception to the order will not preclude their consideration. Certainly it does not appear that an exception was necessary to direct the mind of the trial court to the precise point to afford opportunity for reconsideration, which is one of the functions of an exception. *United States* v. *U. S. Fidelity Co.*, 236 U. S. 512, 529; *Fillippon* v. *Albion Vein Slate Co.*, 250 U. S. 76, 82. And an exception is not necessary to open for our consideration a question of law apparent on the record, as it is here, where there is nothing in the record to indicate waiver of the respondent's rights. *Denver* v. *Home Savings Bank*, 236 U. S. 101, 103-104.

By § 35, Title 2, of the National Prohibition Act, c. 85, 41 Stat. 305, 317 (U. S. C., Title 27, § 52), it is provided that the act

"shall not relieve anyone from paying any taxes or other charges imposed upon the manufacture or traffic in [intoxicating] liquor. No liquor revenue stamps or tax receipts for any illegal manufacture or sale shall be issued in advance, but upon evidence of such illegal manufacture or sale a tax shall be assessed against, and collected from, the person responsible for such illegal manufacture or sale in double the amount now provided by law, with an additional penalty of $500 on retail dealers and $1,000 on manufacturers."

Section 5 of the Willis-Campbell Act, c. 134, 42 Stat. 222, 223 (U. S. C., Title 27, § 3), so far as pertinent here provides:

"That all laws in regard to the manufacture and taxation of and traffic in intoxicating liquor, and all penalties for violations of such laws that were in force when the National Prohibition Act was enacted, shall be and continue in force, as to both beverage and non-beverage liquor, except such provisions of such laws as are directly in conflict with any provision of the National Prohibition Act or of this Act; but if any act is a violation of any of such laws and also of the National Prohibition Act or of this Act, a conviction for such act or offense under one shall be a bar to prosecution therefor under the other."

By § 701, par. 9, of the Revenue Act of 1924, c. 234, 43 Stat. 253, 327 (U. S. C., Title 26, § 206), it is provided that every person carrying on the business of retail liquor dealer, etc., in any state, etc., contrary to the laws of such state, etc., or in any place where

the carrying on of such business is prohibited by local or municipal law, shall pay in addition to all other taxes, $1,000. This section was passed in lieu of a similar provision in the Revenue Act of 1918, repeated in the Revenue Act of 1921. The government, accordingly, treats the item sought to be recovered under § 701 as having been imposed by an act in force prior to the National Prohibition Act. With that view we agree.

Of the four items involved, two unmistakably are penalties, and are so denominated. The other two, notwithstanding they are called taxes, are in their nature also penalties. Putting aside for later consideration the item of $4.68, we consider, for the present, only the other three items.

By § 35, *supra,* it is provided that upon evidence of an illegal sale under the National Prohibition Act, a tax shall be assessed and collected in double the amount now provided by law. This, in reality, is but to say that a person who makes an illegal sale shall be liable to pay a "tax" in double the amount of the tax imposed by preexisting law for making a legal sale, which existing law renders it impossible to make. A tax is an enforced contribution to provide for the support of government; a penalty, as the word is here used, is an exaction imposed by statute as punishment for an unlawful act. The two words are not interchangeable, one for the other. No mere exercise of the art of lexicography can alter the essential nature of an act or a thing; and if an exaction be clearly a penalty it cannot be converted into a tax by the simple expedient of calling it such. That the exaction here in question is not a true tax, but a penalty involving the idea of punishment for infraction of the law is settled by *Lipke* v. *Lederer,* 259 U. S. 557, 561-562. See also *Regal Drug Co.* v. *Wardell,* 260 U. S. 386. There is nothing in *United States* v. *One Ford Coupe,* 272 U. S. 321, or *Murphy* v. *United States,* 272 U. S. 630, to the contrary. The first of these cases was a proceeding to forfeit an automobile because used in violation of law; the other was a suit in equity to enjoin the occupation and use of premises for a year because used in the commission of offenses under the National Prohibition Act, and to abate the maintenance as a nuisance. The distinction made by these four cases is that in the first two, the purpose of the proceedings was punishment; while, as to the other two, the purpose in the first case was to enforce a simple tax, not one which had been,

as here, converted, by a change of its nature, into a penalty, and in the second case the purpose was prevention. *Murphy* v. *United States, supra,* p. 632. Respondent already had been convicted and punished in a criminal prosecution for the identical transactions set forth as a basis for recovery in the present action. He could not again, of course, have been prosecuted criminally for the same acts. Does the fact that the second case is a civil action, under the circumstances here disclosed, alter the rule?

In *United States* v. *Chouteau,* 102 U. S. 603, a distiller and his sureties were sued upon a bond, one of the breaches of which was that the distiller had removed spirits from his distillery without first paying the tax thereon. To this it was pleaded that before the suit was brought two indictments had been found against the distiller for the same removals, and that upon the recommendation of the Attorney General the government had accepted a specified sum in compromise and satisfaction of the indictments, which were thereupon dismissed and abandoned. The court held that the compromise was the same in principle as a conviction in the criminal proceedings, and that the action was barred; and at page 611 said:

"Admitting that the penalty may be recovered in a civil action, as well as by a criminal prosecution, it is still as a punishment for the infraction of the law. The term 'penalty' involves the idea of punishment, and its character is not changed by the mode in which it is inflicted, whether by a civil action or a criminal prosecution. The compromise pleaded must operate for the protection of the distiller against subsequent proceedings as fully as a former conviction or acquittal. He has been punished in the amount paid upon the settlement for the offence with which he was charged, and that should end the present action, according to the principle on which a former acquittal or conviction may be invoked to protect against a second punishment for the same offence. To hold otherwise would be to sacrifice a great principle to the mere form of procedure, and to render settlements with the government delusive and useless."

In *United States* v. *McKee,* 4 Dill. 128, where the defendant was indicted, convicted and punished for conspiring with others to defraud the United States by unlawfully removing distilled spirits from their distilleries without the payment of taxes, it was held by Mr. Justice Miller and Judge Dillon, sitting together, that this constituted a bar to a civil suit to recover the penalty of double the amount of the taxes of which the government had been de-

frauded by means of the conspiracy, the transactions in both cases being the same. To the same effect, see *United States* v. *Gates*, 25 Fed. Cas. 1263, Case No. 15,191.

In the light of these decisions it is clear that if the Willis-Campbell Act be so construed as to justify a recovery in this case, a grave question as to the constitutionality of the act will be presented. The decisions of this court are uniformly to the effect that "A statute must be construed, if fairly possible, so as to avoid not only the conclusion that it is unconstitutional but also grave doubts upon that score." *United States* v. *Jin Fuey Moy*, 241 U. S. 394, 401; *United States* v. *Standard Brewery*, 251 U. S. 210, 220; *Baender* v. *Barnett*, 255 U. S. 224, 226. Doubts as to the meaning of the Willis-Campbell Act, in respect of the questions here for consideration, therefore, must be resolved in accordance with this rule.

Section 5 of the act continues in force all laws in regard to taxation of, and traffic in, intoxicating liquor and penalties for violations of such laws as were in force when the National Prohibition Act was enacted; but with the proviso that a conviction for an act or offense under one shall be a bar to prosecution under the other. The question whether this proviso applies to the present case turns mainly upon the scope and meaning of the word "prosecution", since there is no doubt that respondent had been convicted under the National Prohibition Act of the offense of making the same illegal sales as those alleged as a basis for the imposition of the "taxes" and penalties sought to be recovered in the civil action. The government contends that the word implies a criminal proceeding and cannot be extended to include a civil action. But an action to recover a penalty for an act declared to be a crime is, in its nature, a punitive proceeding, although it take the form of a civil action; and the word "prosecution" is not inapt to describe such an action. In the *McKee* case, *supra*, Mr. Justice Miller evidently held that opinion, since he used both the words "offense" and "prosecution" in characterizing the civil action there under consideration. In any event, we should feel bound to resolve a greater doubt than we now entertain in favor of that interpretation of the word so as to avoid the grave constitutional question which otherwise would arise.

We find no merit in the contention of the government that, as additional amounts resulted from doubling the taxes imposed by R. S. § 3244 and § 701 of the Revenue Act of 1924 and adding penalties, the civil action, in so far as the additional amounts are concerned, arose solely under the National Prohibition Act, and not, as the Willis-Campbell Act contemplates, under preexisting acts. Except for these prior statutes, there would be no basis for seeking to impose a liability on respondent for the amounts sued for in the civil action. Section 35 of the act, in effect, amended the preceding statutes in the particulars stated; and, as thus amended, these statutes now are to be read, as to all subsequent occurrences, as if they had originally been in the amended form. *Blair* v. *Chicago,* 201 U. S. 400, 475; *Pennsylvania Co.* v. *United States,* 236 U. S. 351, 362; *Kelleher* v. *French,* 22 F. (2d) 341, 347; *Cumberland Telephone & Tel. Co.* v. *City of Memphis,* 200 Fed. 657, 660-661; *Farrell* v. *State,* 54 N. J. L. 421, 423-424; *Russell* v. *State,* 161 Ind. 481, 482. To hold that the acts of respondent in question were not violations of these preceding laws as amended, as well as of the National Prohibition Act, would be to give a narrow and strained application to this provision of the Willis-Campbell Act, and to raise the very doubts in respect of its constitutionality which we are bound to avoid if reasonably it can be done.

The government seeks to draw a distinction between the item of $4.68 and the other items, on the ground that the former constitutes a penalty for failure to make and file a return, and respondent was never charged with, or convicted of, an offense involving that omission. Neither the court of appeals nor the district court dealt with the question. The decisions in both courts proceeded upon the theory that all of the items were subject to the same rule; and the record plainly indicates that this was and had been the theory of the government throughout until it came to the preparation of its final brief in this court. The distinction now made was not referred to in the government's petition for certiorari, or in the brief filed in support of it. The point suggests questions which the court of appeals should have been given an opportunity to decide, that is to say, whether a second jeopardy results from the fact, if it be such, that the recovery of the penalty depends upon proof of the same criminal offense of which respondent had theretofore been convicted; and whether requiring under

penalty a return as a retail liquor dealer, amounting, as it plainly does, to an admission of criminal liability, violates the rule against compulsory self incrimination. In this situation we do not now feel called upon to consider or decide the point. If the government, in view of the foregoing and of our decision upon the questions in respect of which the writ of certiorari was granted, shall still desire to press its contention, it will be given an opportunity to do so by first presenting it to the trial court.

The judgment of the court of appeals will be affirmed and the cause remanded to the district court for further proceedings in conformity with this opinion, without prejudice to the further consideration and determination by the district court of the question of liability in respect of the item of $4.68.

It is so ordered.

A true copy.

Test:

Clerk, Supreme Court, U. S.